Docket for 02-6320

No. 02-6320	Status: GRANTED
Title:	John J. Fellers, Petitioner
	v.
	United States
Docketed:	September 13, 2002
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(01-2045)
Decision Date:	April 8, 2002
Rehearing Denied:	May 7, 2002

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 29 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 15, 2002)
Sep 26 2002	Waiver of right of respondent United States to respond filed.
Oct 9 2002	Response Requested . (Due November 8, 2002) None Received
Oct 31 2002	Order extending time to file response to petition to and including December 9, 2002.
Dec 9 2002	Response to petition from respondent United States filed.
Dec 31 2002	Reply of petitioner John J. Fellers filed.
Mar 10 2003	Petition GRANTED.
Apr 2 2003	Motion to appoint counsel filed by petitioner John J. Fellers.
Apr 2 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 26, 2003.
Apr 28 2003	The motion for appointment of counsel is granted and it is ordered that Seth P. Waxman, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
May 12 2003	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 11, 2003.
Jun 19 2003	Joint appendix filed.
Jul 11 2003	Brief amicus curiae of American Bar Association filed.
Jul 11 2003	Brief of petitioner John J. Fellers filed.
Aug 4 2003	Extension of time within which to file respondent's brief on the merits to and including September 26, 2003.
Sep 24 2003	SET FOR ARGUMENT Wednesday, December 10, 2003.
Sep 25 2003	CIRCULATED.
Sep 26 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed).
Sep 26 2003	Brief of respondent United States in opposition filed. (Distributed)
Oct 15 2003	Record received form the U.S.C.A. for the Eighth Circuit. (1 envelope - a portion of the record is sealed)
Oct 17 2003	Record received from the U.S.D.C. for the Dist. of Nebraska. (1 box - a portion of the record is sealed)
Oct 31 2003	Reply of petitioner John J. Fellers filed. (Distributed).

EDITOR'S NOTE

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02-6320

NO._____

Supreme Court, U.S.
FILED
JUL 29 2002
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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
Petitioner,

v.

OFFICIAL

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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SUPREME COURT, U.S.

JOHN J. FELLERS
PRO SE
REG. NO. 16253-047
FEDERAL CORRECTIONAL
INSTITUTION- PEKIN
P.O. BOX 5000
PEKIN, IL 61555-5000

QUESTIONS PRESENTED

I. Did the Court of Appeals err when they concluded that Petitioner's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), was not violated because Petitioner was not "interrogated" by Government agents; when the proper standard under Supreme Court precedent, is whether the Government agents "deliberately elicited" information from Petitioner?

II. Should the second statements- preceded by Miranda warnings- have been suppressed as fruits of the illegal post-indictment interview without the presence of counsel, under this Court's decisions in Nix v. Williams, 467 U.S. 431 (1984), and Brown v. Illinois, 422 U.S. 590 (1975)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
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JOHN J. FELLERS,
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v.

UNITED STATES OF AMERICA,
Respondent.

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SUPREME COURT, U.S.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, John J. Fellers, pro se, requests leave to file a Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 39. Petitioner has attached an affidavit in support of this motion to proceed in forma pauperis.

Dated this 29th day of July, 2002.

Respectfully submitted,

John J. Fellers
Reg. No. 16253-047
Federal Correctional
Institution- Pekin
P.O. Box 5000
Pekin, IL 61555-5000

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in this case, is found at United States v. Fellers, 285 F.3d 721 (8th Cir. 2002). The opinion is reproduced in Appendix "A". The opinion of the denial of rehearing is unpublished. The opinion is reproduced in Appendix "B".

The opinion of the United States District Court for the District of Nebraska, the Honorable Judge Lyle E. Strom is unpublished. The memorandum and order is reproduced in Appendix "C".

The opinion of the United States District Court for the District of Nebraska, the Honorable Magistrate Judge David L. Piester, is unpublished. The order is reproduced in Appendix "D". The Magistrate Judge read his conclusions and findings into the record at the suppression hearing. The transcripts of the suppression hearing are reproduced in Appendix "E".

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's judgment was entered on April 8, 2002. A timely petition for rehearing was filed. The petition for rehearing was denied by the Eighth Circuit on May 7, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
FCI Pekin	Po Box 5000 Pekin IL 61555-5000	5-30-2001	$ 15**
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ N/A
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ N/A	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Jahana Jae Fellers	Daughter	5

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$ N/A
Home maintenance (repairs and upkeep)	$ N/A	$ N/A
Food	$ N/A	$ N/A
Clothing	$ N/A	$ N/A
Laundry and dry-cleaning	$ N/A	$ N/A
Medical and dental expenses	$ N/A	$ N/A

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, John Jay Fellers, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 15	$ N/A	$ 15	$ N/A
Self-employment	$ N/A	$ N/A	$ N/A	$ N/A
Income from real property (such as rental income)	$ N/A	$ N/A	$ N/A	$ N/A
Interest and dividends	$ N/A	$ N/A	$ N/A	$ N/A
Gifts	$ 50	$ N/A	$ 50	$ N/A
Alimony	$ N/A	$ N/A	$ N/A	$ N/A
Child Support	$ N/A	$ N/A	$ N/A	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ N/A	$ N/A	$ N/A	$ N/A
Disability (such as social security, insurance payments)	$ N/A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ 65	$ N/A	$ 65	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Federal Inmate

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 29th July, 2002

John Fellers
(Signature)

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ ~~N/A~~ 340.00 monthly	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ 340.00	$ _____

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution is reproduced in Appendix "B".

STATEMENT OF THE CASE

On February 24, 2000, police officers Jeff Bliemeister and Michael Garnett went to John Fellers home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the officers in his home, the officers told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain person named in the indictment. Fellers responded by stating that he had use methamphetamine, and that he knew some of the individuals that were named in the indictment. At no time during this conversation did the police advise Fellers of his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

The officers then escorted Fellers to jail, where they advised him of his Miranda rights. Fellers signed a written Miranda waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Prior to trial, Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. Fellers argued that the second warned statements should be suppressed on the fruit of the poisonous tree doctrine. The magistrate judge conducted an evidentiary hearing and concluded that Fellers was in custody at the time he made the statements at his home.

Furthermore, the magistrate found that the officers had used deceptive strategems and had interrogated Fellers at his home. The magistrate concluded that the first statements had to be suppressed. Also, the magistrate found that the second statements should be suppressed because the statements made at the jail were the fruits of the first statements which were not preceded by the Miranda warnings. See Appendix "E" (Transcripts of the Suppression Hearing) and Appendix "D" (Order on Suppression Motion).

The district court adopted in part and rejected in part the magistrate's report and recommendation. See Appendix "C" (Memorandum and Order on Suppression Motion). The court agreed that the statements made at Fellers' home should be suppressed. However, the court admitted the second statement Fellers made at the jail after finding that Fellers had knowingly and voluntarily waived his Miranda rights before making those statements. The court believed that the facts of this case fell within the Supreme Court's holding in Oregon v. Elstad, 470 U.S. 298 (1985).

Fellers proceeded to jury trial where the second statements were admitted as evidence. The jury found Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine in violation of 21 U.S.C. § 846 and § 841(a)(1). Fellers was sentenced to 151 months imprisonment.

On appeal, Fellers argued, inter alia, that the district court should have suppressed his inculpatory statements made

at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his Miranda rights at the jail. Fellers also argued that Elstad was distinguishable because Elstad was concerned with the mere failure to administer Miranda warnings, where as here, there was a Sixth Amendment right to counsel violation. The Sixth Amendment right to counsel was violated because Fellers encounter with the police officers constituted a post-indictment interview.

The Eighth Circuit Court of Appeals affirmed Fellers' conviction and sentence on April 8, 2002. See Appendix "A" (United States v. Fellers, 285 F.3d 721 (8th Cir. 2002). In doing so, the Eighth Circuit reasoned that Elstad rendered admissable the statements made by Fellers at the jail. The court also decided that there was no Sixth Amendment violation because Fellers was not interrogated at his home. See Fellers, 285 F.3d at 724.

Circuit Judge Riley filed a concurring opinion disagreeing with the majority opinion, but, nonetheless, affirming the judgment of the court. Judge Riley determined that there was a Sixth Amendment right to counsel violation because the police officers "deliberately elicited" incriminating evidence by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. Fellers, at 726-727. However, Judge Riley concluded that the Sixth Amendment violation did not take Fellers case outside the rationale of Elstad. Id. at 727.

Shortly thereafter, Fellers filed a timely petition for rehearing with the Eighth Circuit. On May 7, 2002, the Eighth Circuit denied the petition for rehearing. See Appendix "B". This petition for a writ of certiorari now follows.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question of whether Fellers' Sixth Amendment right to counsel was violated and whether the fruit of the poisonous tree doctrine applies to this Sixth Amendment violation was presented to the Eighth Circuit Court of Appeals. The Eighth Circuit rejected this argument on the merits and concluded that there was no Sixth Amendment violation. Thus, the claims were properly presented and reviewed below and are appropriate for this Court's consideration.

REASONS WHY THIS WRIT SHOULD ISSUE

I. STARTING WITH MASSIAH V. UNITED STATES, 377 U.S. 201 (1964), THE SUPREME COURT HAS MADE CLEAR THAT IN A POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL, THE STANDARD IN DETERMINING IF THERE IS A SIXTH AMENDMENT VIOLATION IS WHETHER THE GOVERNMENT AGENTS "DELIBERATELY ELICITED" INFORMATION FROM THE DEFENDANT, INSTEAD OF "INTERROGATED" THE DEFENDANT. THE STANDARDS ARE DISTINCT. THE SUPREME COURT HAS APPLIED THE "DELIBERATELY ELICITED" TEST TO EVERY SIXTH AMENDMENT CASE FOLLOWING MASSIAH. THE SUPREME COURT HAS APPLIED THE "INTERROGATED" TEST ONLY TO CASES CHALLENGING A FIFTH AMENDMENT OR MIRANDA VIOLATION. THE EIGHTH CIRCUIT ERRONEOUSLY APPLIED THE "INTERROGATED" TEST TO A SIXTH AMENDMENT-MASSIAH VIOLATION, WHICH IS AT ODDS WITH SIX DECISIONS OF THIS COURT.

II. THIS COURT HAS ALREADY HELD IN NIX V. WILLIAMS, 467 U.S. 431 (1984), THAT THE FRUIT OF THE POISONOUS TREE DOCTRINE IS APPLICABLE IN THE SIXTH AMENDMENT-MASSIAH CONTEXT. THEREFORE, THE COURT'S DECISION IN OREGON V. ELSTAD, 470 U.S. 298 (1985)-WHICH WAS BASED ON A MIRANDA VIOLATION AND THE ABSENCE OF A CONSTITUTIONAL VIOLATION- IS INAPPOSITE. ONCE AGAIN, THE EIGHTH CIRCUIT ERRONEOUSLY APPLIED A FIFTH AMENDMENT-MIRANDA CASE TO A SIXTH AMENDMENT-MASSIAH VIOLATION. FURTHERMORE, UNDER THE COURT'S PRIOR RULINGS, ALL THE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS FRUITS OF THE ILLEGAL POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL.

I.

DID THE COURT OF APPEALS ERR WHEN THEY CONCLUDED THAT PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL UNDER MASSIAH V. UNITED STATES, 377 U.S. 201 (1964), WAS NOT VIOLATED BECAUSE PETITIONER WAS NOT "INTERROGATED" BY GOVERNMENT AGENTS; WHEN THE PROPER STANDARD IS WHETHER THE GOVERNMENT AGENT "DELIBERATELY ELICITED" INFORMATION FROM PETITIONER?

The Eighth Circuit Court of Appeals determined that Fellers' Sixth Amendment right to counsel was not violated. Fellers had argued that the conversation that was initiated by the law enforcement officers at his home- violated his right to have counsel present at a post-indictment interview. The Eighth Circuit found that Fellers' right to counsel was not violated because "the officers did not interrogate Fellers at his home." Fellers, 285 F.3d at 724. Nonetheless, the Eighth Circuit never determined whether the officers "deliberately elicited" the information from Fellers.

Circuit Judge Riley filed a concurring opinion, in which he disagreed whether the arresting officers violated Fellers' right to counsel under the Sixth Amendment. For purposes of the Sixth Amendment right to counsel, Judge Riley concluded, that "an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant." Fellers, at 726. Further, Judge Riley stated that "[a]lthough the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement

in the use and distribution of methamphetamine." Id. at 727. Judge Riley concluded that this conduct violated Fellers' right to counsel. Id.

The question brought to this Court is which standard is to be applied to determine whether Fellers' Sixth Amendment right to counsel was violated.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." The basic contours of this right are well established. See Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Wade, 388 U.S. 218 (1967). "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated against him- 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" Brewer v. Williams, 430 U.S. 387, 398 (1977)(quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

There can be no doubt that Fellers had the right to have the assistance of counsel at his post-indictment interviews with law enforcement authorities. "Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants." Patterson v. Illinois, 487 U.S. 285, 290 (1988); Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, supra; United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton,

474 U.S. 159 (1985); Michigan v. Jackson, 475 U.S. 625 (1986).

This Court first applied the Sixth Amendment to post-indictment communications between the defendant and agents of the Government in Massiah v. United States, supra. There, after the defendant had been charged by indictment, he made incriminating statements to his codefendant, who was an agent of the Government. In reversing the conviction, the Court held that the defendant was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had **deliberately elicited** from him." Massiah, at 206 (emphasis added).

In Brewer v. Williams, supra, this Court left open to question whether the Government must deliberately elicit or interrogate a defendant in a post-indictment interview, to violate a defendant's Sixth Amendment right to counsel. In Brewer, the Court followed Massiah, and concluded that the post-indictment interview violated defendant's right to counsel. When confronted with whether the Court should find if the Government had deliberately elicted or interrogated the defendant, the Court stated that: "There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just assurely as- and perhaps more effectively then- if he had formally interrogated him." Brewer, 430 U.S. at 399. Justice Stewart- who delivered the opinion of the Court- went on to state that "the clear rule of Massiah is that once adversarial proceedings have commenced against, an individual, he has the right to legal

representation when the government interrogates him." Id. at 401. Although Justice Stewart left debatable the question whether the government must affirmatively interrogate, instead of deliberately elicit information from the accused in a post-indictment interview, Justice Stewart later clarified the difference between the two in Rhode Island v. Innis, 446 U.S. 291 (1980).

The Court, in Innis, granted certiorari to address the meaning of interrogation under Miranda v. Arizona, 446 U.S. 934 (1966). The Court stated that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. Turning to the facts of the case, the Court determined that the defendant was not subjected to the functional equivalent of questioning, since it could not be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from defendant. Id. at 302-303.

Justice Stewart- who delivered the opinion of the court- this time clarified the difference between deliberately elicited and interrogated. Justice Stewart noted that:

> "There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of 'interrogation' under Miranda is informed by this Court's decision in Brewer v. Williams. This suggestion is erroneous. Our decision in Brewer rested solely on the Sixth and Fourteenth Amendment right to counsel. That right, as we held in Massiah, prohibits law enforcement officers from 'deliberately eliciting' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed, the petitioner

> in Massiah was not in custody. By contrast, the right to counsel in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the Miranda opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."

Innis, 446 U.S. at 300 n.4 (citations omitted).

In Henry v. United States, supra, the Court was once again asked to determine whether the government must deliberately elicit or interrogate an accused in a post-indictment interview to violate an accused's Sixth Amendment right to counsel. The Henry Court faced a case in which the Government had placed a paid informant in a jail cell with the defendant. The Court granted certiorari to decide whether under the facts of the case, the Government agent deliberately elicited incriminating statements from the defendant within the meaning of Massiah. Although the informant did not ask the defendant any questions, the Court, nonetheless, found that the informant was not a passive listener; rather, the informant had some conversations with the defendant while he was in jail and the defendant's incriminating statements were "the product of this conversation." Henry, 447 U.S. at 271. Continuing, the Court found that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal." Id. at 273. And that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." Id. at 274.

The Government, in Henry, argued that the Court should look to whether the defendant was interrogated to determine a Massiah violation. The Court rejected this argument. In doing so, the Court stated that "[w]hile affirmative interrogation, absent waiver, would certainly satisfy Massiah, we are not persuaded, as the Government contends, that Brewer v. Williams, modified Massiah's deliberately elicited test." Henry, at 271. The Court went on to cite, in approval, Justice Stewart's footnote in Innis.

From these precedents, it is clear that once a defendant is indicted the Government may not deliberately elicit information from him without the presence of counsel. It is equally clear that once a defendant raises a Sixth Amendment-Massiah challenge, the question of whether the defendant was interrogated becomes constitutionally irrelevant. See, Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986)("[A]fter the initiation of adversarial judicial proceedings, the Sixth Amendment provides a right to counsel at a critical stage even when there is no interrogation and no Fifth Amendment applicability.") Thus, the Eighth Circuit clearly erred when it determined that Fellers' Sixth Amendment right to counsel was not violated because Fellers was not interrogated at his home. 1/

1/ Also, it appears that the Eighth Circuit violated its own precedent when it determined that since the officers did not interrogate Fellers, his Sixth Amendment right to counsel was not violated. See, Moore v. United States, 178 F.3d 994, 999 (8th Cir. 1999)(Holding that a Massiah violation has occured when the government "deliberately elicit[s] incriminating statements" from a defendant.).

It is unquestionable that the police officers deliberately elicited information from Fellers in the post-indictment interview at his home. The first statement the officers made to Fellers was we need to talk to you about your involvement in the use and distribution of methamphetamine. Suppression Hearing, pages 40, 42, 53. See also, Moulton, 474 U.S. 177 n.14 (Defendant's Sixth Amendment right to counsel "was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him."). Also, the officers said they wanted to talk to Fellers about his use and distribution of methamphetamine as it pertained to individuals named in the indictment. Supp.H., page 42. These comments could have no other practical purpose other than to elicit a response from Fellers. "By intentionally creating a situation likely to induce [Fellers] to make incriminating statement without the assistance of counsel, the Government violated [Fellers'] Sixth Amendment right to counsel." Henry, 447 at 274. Officer Bleimeister even acknowledged this fact when he said he was not suprised that his comments got a response from Fellers. Supp.H., page 52. 2/

Furthermore, the officers already knew that Fellers had been indicted, for they were there to arrest him pursuant to this indictment. Thus, it cannot be said that the officers proceeded to deliberately elicit information out of a mistaken belief that Fellers had not yet been charged. It is clear that Fellers had a Sixth Amendment right to have counsel present

2/ In fact, the Magistrate Judge concluded that the officers used deceptive strategems and that Fellers was interrogated under the standard set forth in Innis. Supp.H., pages 104-105.

when the officers conducted this post-indictment interview. As the Massiah Court noted, if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." Massiah, 377 U.S. at 206.

II.
SHOULD THE SECOND STATEMENTS- WHICH WERE PRECEDED BY MIRANDA WARNINGS- HAVE BEEN SUPPRESSED AS FRUITS OF THE ILLEGAL POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL, UNDER THIS COURT'S DECISIONS IN NIX V. WILLIAMS, 467 U.S. 431 (1984), AND BROWN V. ILLINOIS, 590 U.S. 590 (1975)?

The Eighth Circuit held that the second statements made at the jail, after the advisement of Miranda rights, were admissible at Fellers' trial. The Eighth Circuit concluded that Oregon v. Elstad, 470 U.S. 298 (1985), rendered admissible the statements made by Fellers at the jail. Fellers, 285 F.3d at 724. However, since the Eighth Circuit found no Sixth Amendment-Massiah violation, they never determined whether the second statements should have been excluded as fruits of the illegal post-indictment interview.

The exclusionary rule, which bars the admission of evidence obtained in violation of the Constitution, extends beyond the direct products of police misconduct to evidence derived from the illegal conduct, or "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939). Assuming the primary illegality can be established, the Supreme Court has held that "the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence." Nix v. Williams, 467 U.S. 431, 441 (1984)(citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). Although the cases which mark the origin and developement of the "fruit of the poisonous tree" doctrine involved violations of the

Fourth Amendment guarantee against searches and seizures. 3/ the doctrine also applies to the fruits of evidence obtained in violation of an accused's Sixth Amendment right to counsel. See, e.g., United States v. Wade, 388 U.S. 218 (1967).

The Eighth Circuit erroneously determined that this Court's ruling in Elstad was applicable to the facts of this case. In Elstad, the Court granted certiorari to consider whether the Self-Incrimination Clause of the Fifth Amendment required suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant. In holding that the second warned statement was admissible, the Court stated:

> "It [would be] an unwarranted extension of Miranda to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."

Elstad, 470 U.S. at 309.

The Elstad Court was concerned with only the Fifth Amendment and specifically a violation of Miranda warnings. Moreover, the Court described the Miranda warnings as prophylactic and not themselves, a violation of the Fifth Amendment. Thus, the Court in Elstad, based its ruling on the absence of a constitutional violation. See, Elstad, 470 U.S. at 305 ("Respondent's contention that his confession was tainted by the earlier failure of the police to provide Miranda warnings and must be excluded

3/ See, e.g. Silverthorne, 251 U.S. 385; Wong Sun v. United States, 371 U.S. 471 (1963).

as 'fruit of the poisonous tree' **assumes the existence of a constitutional violation.**")(emphasis added): Id. at 306 ("The Miranda exclusionary rule, however,... sweeps more broadly than the Fifth Amendment itself. **It may be triggered even in the absence of a Fifth Amendment violation.**")(emphasis added); Id. at 309 ("If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences **as police infringement of the Fifth Amendment itself.**")(emphasis added). Since the Elstad Court was concerned with the applicability of the fruits doctrine to Miranda, and the absence of a constitutional violation, whereas here, there was a Sixth Amendment-Massiah violation, Elstad is distinguishable from the case at bar. Just as the Eighth Circuit applied the wrong test to determine whether the Government had deliberately elicited (Sixth Amendment) or interrogated (Fifth Amendment) Fellers, the Eighth Circuit also erroneously applied Elstad (Miranda-Fifth Amendment) to a Sixth Amendment-Massiah violation.

The Supreme Court has already applied the fruit of the poisonous tree doctrine to a Massiah violation. The Court in Nix v. Williams, 467 U.S. 431 (1984), concluded that more may, at times, be necessary to neutralize the taint produced by the governement deliberately eliciting information in a post-indictment interview. Specifically, the Nix Court held that a violation of Massiah requires suppression of all derivative evidence gleaned through exploitation of the Government's wrongdoing.

Id. at 441-43. Thus, the appropriate remedy for a violation of Massiah includes not only suppression of all evidence directly obtained through governmental misconduct, but also suppression of all evidence that can properly be designated as the fruits of that conduct.

When determining whether a particular piece of evidence is the fruit of police illegality, the Court must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488. 4/

In order for the casual chain, between the illegal post-indictment interview and the statements made subsequent thereto, to be broken, Wong Sun requires that it be "sufficiently an act of free will to purge the primary taint." Wong Sun, 371 U.S. at 486. This Court, in Brown v. Illinois, 422 U.S. 590 (1975), held that the Miranda warnings alone cannot always make the act sufficiently a product of free will to break the

4/ Four exceptions to the fruit of the poisonous tree doctrine have developed. First, facts obtained as a result of a constitutional violation still may be used if they can be proven by a lawful source independent of the violation. Silverthorne. Second, evidence which would have ultimately been discovered by lawful means also is admissible. Nix. Third, if the casual connection between the constitutional violation and the evidence in question is so attenuated as to dissipate the taint, the evidence is admissible. Nardone. Finally, if the government's agents have a good faith belief that there actions were constitutionally permissible- such, as where an officer arrests an individual in reliance on a warrant later invalidated- the evidence is admissible. Arizona v. Evans, 514 U.S. 1 (1995). None of these exceptions applies to the facts of this case.

casual connection between the illegality and the confession. Id. 422 U.S. at 603. The Brown Court stated that "[n]o single fact is dispositive." Id. In discussing the factors to be considered in whether a confession is obtained by the exploitation of a constitutional violation, the Court noted that the "temporal proximity of the arrest and confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." Id. at 603-604 (internal citation omitted). "And the burden of showing admissibility rests, of course, on the prosecution." Id.

As already noted, the Eighth Circuit did not undertake the inquiry suggested by Wong Sun and Brown, Nevertheless, as in Brown, 422 U.S. at 604, and Rawlings v. Kentucky, 448 U.S. 96 (1980), the suppression hearing resulted in a record of ample detail for this Court to make a determination.

First of all, Fellers' second statement was separated from the illegal post-indictment interview by less than a half-hour. See, Supp.H. pages 44-45, 85, 106. See also, Brown, at 604; Dunaway v. New York, 442 U.S. 200, 218 (1979)(Where the time between the illegal arrest and the confession was two hours).

Furthermore, there was no intervening event of significance between the first and second statements. Although the second statement were preceded by Miranda warnings, the warnings are not a "cure-all", and cannot "make the act sufficiently a product of free will to break... the casual connection between the

illegality and the confession." Brown, at 602-603. Fellers received the Miranda warnings only moments before he made incriminating statements. The Brown Court treated this consideration as important in determining whether the statements at issue were obtained by exploitation of a constitutional violation. See, Rawlings, 448 U.S. at 107.

The post-indictment interview- specifically, the officers telling Fellers that they were there to discuss his involvement in the use and distribution of methamphetamine- had a "quality of purposefulness" in that it was an "expedition for evidence" undertaken "in the hope that something might turn up." Brown, at 605. The first thing officer Bliemeister said to Fellers was, were here to discuss your involvement in the use and distribution of methamphetamine. On a previous occassion, Bliemeister had been to Fellers' home and said the same thing, that I'm here to discuss your involvement in the use and distribution of methamphetamine. Supp.H. pages 35-39. Both officers, testified that the comments made to Fellers at his home was not part of their training. Supp.H. pages 51 and 82. After the officers arrested and transported Fellers to the jail, they advised him of his Miranda warnings and then they ask him to go into greater detail about his involvement in the use and distribution of methamphetamine. Supp.H. pages 46-47. There was no significant break in the stream of events to insulate the second warned confession from the damning impact of the first confession. See, Brown, at 605 n.12 ("The fact that Brown had made one

statement, believed by him to be admissible,... bolstered the pressure for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination."). It is clear that the officers deliberately and designedly set out to elicit incriminating statements from Fellers. As such, the second statements were not a sufficient act of free will to purge the primary taint.

Other than the difference between the initial constitutional violation, the situation in this case is virtually a replica of the situation in Brown and Wong Sun. This Court's ruling in Nix, requires that since the government violated Fellers' Sixth Amendment rights, all of the statements made by Fellers should have been suppressed as fruits of that illegal conduct.

The Eighth Circuit's determination that Fellers' Sixth Amendment right to counsel was not violated is at odds with at least six decisions of the Supreme Court. Furthermore, the Eighth Circuit's decision that the fruit of the poisonous tree doctrine is not applicable to a Sixth Amendment violation contradicts two decisions of this Court. For the reasons stated above, this Court should grant this writ to correct these errors made by the Eighth Circuit.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court grant this writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Dated this 29th day of July, 2002

Respectfully submitted,

John J. Fellers

CERTIFICATE OF SERVICE

I, John J. Fellers, do hereby certify that a true and correct copy of the Petition for Writ of Certiorari, in the above-entitled case, was served on the parties below. Said Petition was sent by U.S. Mail, postage pre-paid on this 29th day of July, 2002.

John J. Fellers

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TED STATES COURT OF A ALS

FOR THE EIGHTH CIRCUIT

No. 01-2045

United States of America,

Appellee,

vs.

John J. Fellers,

Appellant.

Appeal from the United States District Court for the District of Nebraska

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

(5193-010199)

May 7, 2002

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

ed States v. Beck, 140 F.3d 1129, 1137–38 (8th Cir.1998), or *United States v. Wood*, 106 F.3d 942, 946–47 (10th Cir.1997), in which a combination of innocent factors was not enough to create reasonable suspicion. The district court did not therefore err when it concluded that the totality of the circumstances provided Dixon with reasonable suspicion to detain Linkous and Yates for the dog sniff.

[9, 10] The length of time Linkous and Yates were detained was not unreasonable. The time elapsed between the initial stop of the van and the arrest of Yates and Linkous was only nineteen minutes. The record indicates that they were delayed no more than seven or eight minutes from the time Dixon radioed for assistance until the dog completed its sniff of the van. A short detention for a dog sniff after the completion of a traffic stop does not violate the Fourth Amendment. *See United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 648–49 (8th Cir.1999), *cert. denied*, 528 U.S. 1161, 120 S.Ct. 1175, 145 L.Ed.2d 1083 (2000) (two minute delay for dog sniff a de minimis intrusion); *Morgan*, 270 F.3d at 632 (same conclusion for a delay of less than ten minutes). In this case, Officer Dixon had not even had time to write any traffic citations at the point at which his suspicions were reasonably aroused and he radioed for assistance. The traffic stop had not then been completed, and the dog arrived within several minutes. Once it alerted to the presence of drugs in the van, there was probable cause to search the vehicle. *Bloomfield*, 40 F.3d at 919.

In sum, we conclude that Linkous and Yates were not illegally detained and that the district court did not err in denying Linkous' suppression motion. The judgment is therefore affirmed.

UNITED STATES of America, Appellee,

v.

John J. FELLERS, Appellant.

No. 01-2045.

United States Court of Appeals, Eighth Circuit.

Submitted: Oct. 16, 2002.

Filed: April 8, 2002.

Defendant was convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, J., of conspiracy to possess with intent to distribute methamphetamine, and he appealed. The Court of Appeals, Wollman, Chief Judge, held that: (1) failure of officers to administer *Miranda* warnings before defendant made inculpatory statements at his home did not require suppression of his subsequent jailhouse statements; (2) evidence was sufficient for conviction; (3) the district court did not abuse its discretion in denying a motion for a new trial based upon newly discovered evidence; (4) sentence was proper though based upon a finding of drug quantity that exceeded that found by the jury; and (5) defendant was not entitled to a two-level reduction as a minor participant.

Affirmed.

Riley, Circuit Judge, filed a concurring opinion.

1. Criminal Law ⇐1134(3)

The voluntariness of a confession is a legal inquiry subject to plenary appellate review.

2. Criminal Law ⇐412.1(1)

To determine if defendant's inculpatory statements were voluntary, court must determine if, in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will.

3. Criminal Law ⇐519(1)

Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense.

Criminal Law ⇐412(4)

Failure of officers to administer *Miranda* warnings before defendant made inculpatory statements at his home when officers went there to arrest him did not require suppression of his subsequent jailhouse statements, where those statements were knowingly and voluntarily made following the administration of the *Miranda* warnings.

5. Criminal Law ⇐412.2(3)

Officers' failure to administer the *Miranda* warnings at defendant's home when they went there to arrest him did not violate his Sixth Amendment right to counsel on theory the encounter constituted a post-indictment interview, where the officers did not interrogate defendant at his home, though he did make inculpatory statements. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐404.60

Methamphetamine seized from a co-conspirator was admissible in prosecution for conspiracy to possess with intent to distribute methamphetamine, where the evidence established that the seized drugs were part of the on-going conspiracy for which defendant was prosecuted.

7. Witnesses ⇐267

There was no abuse of discretion in district court's limiting defendant's cross-examination of a witness, where defendant was allowed to cross-examine the witness about the issues with which he was concerned.

8. Conspiracy ⇐47(12)

Testimony from multiple witnesses that they bought from and sold to defendant methamphetamine, including testimony that the quantities sold to defendant were sufficient for redistribution to others, was sufficient to support conviction for conspiracy to possess with intent to distribute methamphetamine, despite defendant's assertion that the testimony of his coconspirators was not credible and should have been disregarded. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

9. Criminal Law ⇐942(1)

The district court did not abuse its discretion in denying a motion for a new trial based upon newly discovered evidence, where the new evidence defendant pointed to was merely impeachment evidence.

10. Jury ⇐34(1)

Sentence was proper though based upon a finding of drug quantity that exceeded that found by the jury, where the sentence did not exceed the statutory maximum allowable under the jury's verdict.

11. Criminal Law ⇐1023(11)

Where the district court was aware of its authority to depart downward, its refusal to exercise its discretion to depart from the applicable guideline range was unreviewable.

12. Sentencing and Punishment ⇐764

In sentencing for conspiracy to possess with intent to distribute methamphetamine, defendant was not entitled to a two-level reduction as a minor participant, despite contention that the majority of the evidence showed him as receiving the drugs, not distributing them, where there was sufficient evidence indicating that he had a larger role in the conspiracy than being a mere user.

Sean J. Brennen, Lincoln, NE, argued, for appellant.

Janice M. Lipovsky, Asst. U.S. Atty., Lincoln, NE, for appellee.

Before: WOLLMAN,[1] Chief Judge, LAY, and RILEY, Circuit Judges.

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court [2] for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

I.

On February 24, 2000, two policemen went to Fellers's Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his *Miranda* rights.

The officers then escorted Fellers to jail, where they advised him of his *Miranda* rights. Fellers signed a written *Miranda* waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers's home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers's request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers's past criminal conduct, the district court raised Fellers's criminal history category to III and sentenced him to 151 months' imprisonment.

1. The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

2. The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.

[1–3] The voluntariness of a confession is a legal inquiry subject to plenary appellate review. *United States v. Robinson*, 20 F.3d 320, 322 (8th Cir.1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)) (internal citation omitted).

[4] Contrary to Fellers's contention otherwise, we conclude that *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), renders admissible the statements made by Fellers at the jail. In that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his *Miranda* rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. *Id.* at 300–302, 105 S.Ct. 1286. In holding that the statement given at the sheriff's office was admissible, the Court stated:

> It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309, 105 S.Ct. 1285.

[5] Citing *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. *See Elstad*, 470 U.S. at 314–15, 105 S.Ct. 1285; *Robinson*, 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

III.

[6] Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie*, 257 F.3d 908, 915 (8th Cir.2001).

[7] Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart*, 122 F.3d 625, 627 (8th Cir.1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

[8] Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.'" *United States v. Santana*, 150 F.3d 860, 864 (8th Cir.1998) (quoting *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir.1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana*, 150 F.3d at 864 (citing *United States v. Anderson*, 78 F.3d 420, 422–23 (8th Cir.1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This testimony was sufficient to support Fellers's conviction.

[9] Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

> We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

United States v. Zuazo, 243 F.3d 428, 431 (8th Cir.2001) (citing *Lindhorst v. United States*, 658 F.2d 588, 602 (8th Cir.1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

IV.

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

[10] Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana*, 150 F.3d at 864 (quoting *United States v. Moss*, 138 F.3d 742, 745 (8th Cir.1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable

to Fellers during the course of the conspiracy was more than 500 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth*, 251 F.3d 871, 878 (8th Cir. 2001), it is "proper for the sentencing judge to then make more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Pugsley*, 240 F.3d 286, 293 (8th Cir.2001). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

[11] Fellers challenges district court's denial of his motion for downward departure. "So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable." *United States v. Evidente*, 894 F.2d 1000, 1004–05 (8th Cir.1990), and thus Fellers's challenge fails.

[12] Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." *United States v. Alvarez*, 235 F.3d 1096, 1099 (8th Cir.2000) (quoting *United States v. Hale*, 1 F.3d 691, 694 (8th Cir.1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. *Massiah v. United States*, 377 U.S. 201, 205–06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. *See id.* at 206, 84 S.Ct. 1199. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. *See United States v. Henry*, 447 U.S. 264, 270–71, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Brewer v. Williams*, 430 U.S. 387, 399–401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *cf. Rhode Island v. Innis*, 446 U.S. 291, 300–02 & 300 n. 4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret ... compromises the voluntariness of a subsequent informed waiver." *Id.* at 312, 105 S.Ct. 1285. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.

UNITED STATES of America, Appellee,

v.

Daniel GREATWALKER, Appellant.

No. 01-3005.

United States Court of Appeals, Eighth Circuit.

Submitted: Feb. 12, 2002.

Filed: April 8, 2002.

Defendant pleaded guilty to first-degree murder on an Indian reservation and, following denial of motion to withdraw plea, was sentenced by the United States District Court for the District of North Dakota, Patrick A. Conmy, J. Defendant appealed. The Court of Appeals, Fagg, Circuit Judge, held that 35 year sentence for first degree murder, pursuant to plea bargain, was illegal, requiring withdrawal of the plea.

Vacated and remanded.

1. Sentencing and Punishment ⇐31

A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.

2. Criminal Law ⇐2163.1)

Homicide ⇐354(2)

Where the Government had not sought the death penalty, life imprisonment was the applicable mandatory sentence for defendant's plea to first-degree murder, and absent applicability of a departure for substantial assistance or a safety valve departure, 35 year sentence, pursuant to plea bargain, was illegal, requiring withdrawal of the plea when defendant was not willing to accept a life sentence on the guilty plea. 18 U.S.C.A. §§ 1111, 3553(e, f).

3. Criminal Law ⇐273.1(2)

There can be no plea bargain to an illegal sentence, even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law.

4. Criminal Law ⇐2163.1)

When a defendant has entered a plea bargain contemplating an illegal sentence,

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
00 APR 20 PM 1:55
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	4:00CR3014
	)	
v.	)	
	)	ORDER
JOHN J. FELLERS,	)	
	)	
Defendant.	)	

A hearing on the defendants motion to suppress was held before me this date. At the commencement of the hearing the defendant withdrew that portion of the motion concerning the shotguns and rifles in his residence, the government conceding that they would not be used by the government in this case. The hearing proceeded on the remainder of the motion, pertaining to defendant's statements.

At the conclusion of the hearing I read into the record my findings and recommendation. For the reasons stated from the bench at the conclusion of the hearing,

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Lyle E. Strom, United States Senior District Judge, pursuant to 28 U.S.C. 636(b)(1)(B), that the motion to suppress, filing 13, be GRANTED in the respects noted in my comments on the record, and DENIED in all other respects.

FURTHER, IT HEREBY IS ORDERED:

1. This report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk.

2. When the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties.

3. The parties are notified that any failure to file an objection to this report and recommendation within the time permitted by the local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation.

APR 2 9 2000
BY:

4. That portion of the motion to suppress, filing 13, which addresses firearms found at the defendant's residence, is deemed withdrawn.

Dated April 20, 2000.

BY THE COURT:

David L. Piester
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

JUN 0 9 2000

UNITED STATES OF AMERICA, Plaintiff, v. JOHN J. FELLERS, Defendant.	4:00CR3014 MEMORANDUM AND ORDER

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 21, pp. 102-108), the defendant's objection to the report and recommendation (Filing No. 22), and the government's objection to the magistrate judge's report and recommendation (Filing No. 23). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of defendant's motion, the transcript of the hearing on said motion (Filing No. 21), the magistrate judge's report and recommendation, the objections of the parties, together with their supporting briefs.

The magistrate judge found that the defendant was in custody at the time he made certain statements in his home, that he was not Mirandized and that his statements were in response to statements of the officers which the magistrate judge found to be implicitly questions. The magistrate judge further found that no strong-armed tactics were used, but he did find there was use of deceptive stratagems in that the officers told the defendant the purpose of their visit was to discuss his role in methamphetamine use and distribution when their primary purpose was to arrest him.

The magistrate judge concluded that all statements made by the defendant at his home prior to his being taken to the police station and the reading of his *Miranda* rights and all statements made by the defendant at the police station which referred to or addressed the specific individuals who were identified by the officers at defendant's home prior to his formal arrest and transportation to the police station be suppressed.

The government's motion seeks an order from the Court rejecting the magistrate judge's report and recommendation in its entirety and denying defendant's motion to suppress. The defendant's objections specifically seek a clearer definition of the scope of the magistrate judge's order of suppression. The Court finds that the magistrate judge's recommendation is too broad and that it should be accepted by the Court only to the extent that all comments or statements made by the defendant at his home prior to his being taken to the police station should be suppressed. The Court finds that defendant was properly given his *Miranda* warnings, that he acknowledged he understood them and that he knowingly and voluntarily consented to speak with the officers, and, therefore, statements he made thereafter are admissible to the extent that they are relevant to any of the issues in the case.

DISCUSSION

Briefly, the Court notes that on February 24, 2000, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister, went to the home of John Fellers for the purpose of arresting him (Filing No. 23, p. 7:11-15). They knocked

on the door. When defendant responded, they identified themselves and asked if they could come in. The defendant invited the officers in and they all entered the living room of defendant's home. Shortly thereafter, the defendant sat down on the davenport, invited the officers to sit, but they continued to stand. The evidence reflects that the officers then advised the defendant that they were there to discuss his involvement regarding the distribution of methamphetamine, that they had a federal arrest warrant, and that the Grand Jury had indicted him for conspiracy to distribute methamphetamine.

The officers specifically stated that the indictment was regarding his association with persons such as Kathi Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. The evidence is clear that at that point, Mr. Fellers began offering information regarding personal problems which he had during which he admitted he had been using methamphetamine at the time period he associated with these individuals. Other than the foregoing statements by the officers, no further questions were directed at defendant, nor were any specific questions asked of him regarding his use or distribution of methamphetamine. Subsequently, after about fifteen minutes in the defendant's home, the officers took Mr. Fellers into custody and to the Lancaster County jail where he was booked. The officers testified that after he was booked, they, using a written form, advised him of his rights as required by *Miranda*. They asked each question individually, asking Mr. Fellers to respond either "yes" or "no" to each question. At the conclusion of the reading

and advising him of his rights, the defendant and the two officers signed the waiver of *Miranda* rights form (Exhibit No. 1). (See Transcript (Filing No. 21, pp. 16-19)). He thereafter voluntarily gave a statement.

The Court believes that the facts of this case fall squarely within the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). In the *Elstad* case, the evidence reflected that the officer had an arrest warrant for Mr. Elstad. When he arrived at the Elstad residence, he sat down with the defendant and asked defendant if he was aware of why he and another detective were there to talk with him. The defendant replied: "No." The officer then asked him if he knew a person by the name of Gross, and the defendant responded: "Yes." The defendant further stated he had heard there was a robbery at the Gross house. At that point, the officer said to Mr. Elstad that he felt that Mr. Elstad was involved in that, and Elstad looked up at the officer and replied: "Yes, I was there." Subsequently, Elstad was escorted to the patrol car, taken to the Sheriff's office and booked. He was then given his *Miranda* warnings, which he indicated he understood, and having those rights in mind, he indicated he wished to speak with the officers.

The trial court let in defendant's written confession. However, the Oregon Court of Appeals reversed the conviction, and the Oregon Supreme Court refused to review. The Oregon Court of Appeals held that the failure to give the defendant his *Miranda* warnings at his home tainted his subsequent written confession, and

accordingly, the Court should have suppressed the use of that confession as evidence. The United States Supreme Court reversed. The Supreme Court noted that the Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. The Court went on to note that it would be an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, "unaccompanied by any actual coercion or other circumstances, calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process" that a subsequent voluntary and informed waiver is ineffective. The Court then noted:

> Though *Miranda* requires the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Supra, at p. 309. The Supreme Court further noted:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. The Court concluded:

> We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by importing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318. In this case, the defendant made a statement at the police station after having been advised of his *Miranda* rights, and the evidence establishes that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when he gave his statement to the police. The Court finds the unwarned statements of the defendant made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings. The Court will adopt the magistrate judge's findings as they relate to the unwarned statements made by defendant at his home but rejects the findings as they relate to the subsequent statement made after he received the *Miranda* warnings.

The Court has reviewed the defendant's objections and finds the foregoing discussion resolves those objections, and they will be denied. The Court will adopt in part and reject in part the magistrate judge's report and recommendation. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge is adopted and rejected in accordance with this memorandum opinion.

2) The unwarned statements made by the defendant at his home prior to his being taken to the Lancaster County Sheriff's Office are suppressed.

3) The statements of the defendant given at the police station after he had received his *Miranda* warnings are admissible.

DATED this 8th day of June, 2000.

BY THE COURT:

LYLE E. STROM, Senior Judge
United States District Court

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ
Of Certiorari

USAP 8th Cir. No. 01-2045

DECLARATION OF MAILING

Comes Now John J. Fellers and submits this Declaration of Mailing in compliance with Supreme Court Rule 29.2 and 28 U.S.C. § 1746. In support of this declaration, Movant states as follows:

1). That I am John J. Fellers the Movant in the above-entitled case.

2). That I am a federal inmate at F.C.I. Pekin.

3). That I placed my Petition for Writ of Certiorari in the F.C.I. legal mail-box on July 29, 2002.

4). Thus, the Petition for Certiorari was timely filed.

5). That a copy of the certified slip that was attached to the Petition for Writ of Certiorari is attached in support of this declaration.

FURTHER DECLARANT SAYETH NOT

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3 of Sept, 2002

John J. Fellers

John J. Fellers
Reg. No. 16253-047
Federal Correctional
Institution- Pekin
P.O. Box 5000
Pekin, IL 61555-5000

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Fellers v. United States of America
Petition for Writ of Certiorari

Dear Clerk,

I have enclosed my Petition for Writ of Certiorari to be filed with the Court. Also, I know that the majority of pro se filings are frivolous, but this petition has substantial merit. The ruling of the Eighth Circuit Court of Appeals, in this case, is in conflict with no less than eight decisions of the Supreme Court. I don't mention this to garner any special attention, instead, I wrote this letter to let you know that this pro se petition is not just a source of busy-work. Thank you for your time and consideration in this matter.

Sincerely,

John J. Fellers

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AUG - 6 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

cc: file
USCA

John J. Fellers
Reg. No. 16253-047
Federal Correctional Institution
P.O. Box 5000
Pekin, IL 61555-5000

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Fellers v. United States of America
Petition For Writ of Certiorari

Dear Clerk,

I have enclosed my Petition for Writ of Certiorari to be filed with the Court. The letter I received from the Clerk's office stated that I needed to enclose the report and recommendation of the magistrate. However, the report and recommendation was included with the petition. The report and recommendation is in Appendix "D" and Appendix "E". In Appendix "E" is the transcripts of the suppression hearing where the magistrate read his conclusions of law and fact. Later, there was a Memorandum and Order on the Suppression Hearing in which the magistrate referred to the suppression hearing and recommended that the motion to suppress be denied in part and granted in part. This is Appendix "D". Both of these were included in the original petition.

I have also enclosed an affidavit of mailing pursuant to Rule 29.2 because of the missing or illegible postmark.

Thank you for your time and consideration in this matter.

Sincerely,

John J. Fellers

RECEIVED
SEP 11 2002
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SUPREME COURT, U.S.

APPENDIX "A"

APPENDIX "B"

APPENDIX "C"

APPENDIX "D"

APPENDIX "E"

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
00 MAY -2 AM 7:03
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. 4:00CR3004
vs.	)	HEARING ON DEFENDANT'S MOTION TO SUPPRESS
JOHN J. FELLERS, Defendant.	)	

Hearing held before the HONORABLE DAVID L. PIESTER, United States Magistrate Judge, on April 20, 2000 in Lincoln, Nebraska.

APPEARANCES:

MS. JAN LIPOVSKY
Attorney at Law
555 South 10th Street
Lincoln, Nebraska 68508-2803 for Plaintiff.

MR. SEAN J. BRENNAN
Attorney at Law
140 North Eighth Street, #340
Lincoln, Nebraska 68508 for Defendant.

April 20, 2000

(Whereupon, the following proceedings took place at 9:00 a.m.:)

THE COURT: Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor. This is a case of United States of American versus John J. Fellers. It's found at Docket 4:00CR3014. I would ask the record to reflect my presence for the United States. Mr. Fellers is present with his counsel.

We are here today regarding the motion to suppress evidence and statements that was filed by Mr. Fellers. I would advise the Court that I have had an opportunity to talk with Mr. Brennan prior to the beginning of this hearing. As the Court's probably aware, in my response I indicated that the Government does not intend to use the guns that were taken from the home and we don't have any problem turning them over to an appropriate person. I spoke with Mr. Brennan about that, and I believe he's agreed to withdraw that part of the suppression motion with that understanding.

THE COURT: Is that correct, Mr. Brennan?

MR. BRENNAN: Yes, that is correct, with the understanding that the Government's statement to the Court that they will not be using the guns as evidence in this case and are willing to turn custody of those

weapons over to a person other than Mr. Fellers, we would withdraw the portion of the motion to suppress that refers to the guns and that the hearing would then proceed on the motion to suppress the statements and not the evidence.

THE COURT: Very well. Do either of you wish to make an opening statement?

Mr. Brennan?

MR. BRENNAN: No, I would waive opening statement.

MS. LIPOVSKY: I would also waive.

THE COURT: All right. And are there witnesses here other than -- who's the first witness?

MS. LIPOVSKY: I have two witnesses that are both outside. Mr. Brennan had indicated he did want a sequestration order.

THE COURT: All right.

MR. BRENNAN: And there are no other witnesses in the courtroom.

THE COURT: All right. If somebody comes in, you can let me know and I'll advise them accordingly.

You can call your first witness.

MS. LIPOVSKY: Thank you.

THE COURT: Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Jeff Bliemeister. B-l-i-e-m-e-i-s-t-e-r.

THE CLERK: Please raise your right hand.

Do you solemnly swear or affirm the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I swear.

THE CLERK: Please have a seat in the witness chair.

JEFF BLIEMEISTER

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Please state your business address.

A. 575 South 10th Street in Lincoln.

Q. By whom are you employed?

A. The Lancaster County Sheriff's Office.

Q. And in what capacity are you employed there?

A. I am currently employed as a deputy sheriff and assigned to the Lincoln Lancaster County Narcotics Task Force.

Q. How long have you been a law enforcement officer?

A. Since March of 1996.

Q. And how long have you worked with narcotics?

A. Approximately two years and four months.

Q. What are your general duties as a member of the narcotics task force?

A. I'm assigned to investigate persons involved in the distribution of multiple different kinds of narcotics, both through what we call street enforcement and also through historical cases.

Q. When you work on historical cases, do you obtain and make yourself aware of information obtained from other officers through various sources?

A. Yes.

Q. Do you review reports prepared by them?

A. Yes.

Q. And have you become ever involved with debriefing or proffer interviews of cooperating individuals?

A. Yes, I have.

Q. Do you use that information in assisting you in historical investigations?

A. Yes.

Q. (Coughing) Excuse me. And have you had

training and education to assist you in performing your duties as a law enforcement officer?

A. I have.

Q. Have you been involved in the investigation of John Fellers?

A. Yes.

Q. And is John Fellers present in the courtroom today?

A. He is.

Q. Could you identify him for the Court, please.

A. Mr. Fellers is seated to the right of the defense counsel. He's wearing a striped, lighter colored shirt and blue jeans.

MS. LIPOVSKY: I ask the record reflect the witness has identified the defendant.

THE COURT: It will.

Q. (By Ms. Lipovsky) Deputy Bliemeister, were you involved in contacting Mr. Fellers on February 24th of the year 2000?

A. Yes.

Q. Was that the first time you'd had contact with Mr. Fellers?

A. No.

Q. When did you first meet Mr. Fellers?

A. I believe I first met Mr. Fellers in 1995

while doing volunteer work at Lincoln General Hospital.

Q. And on -- so was this a person that you knew by sight?

A. Yes, it was.

Q. On the 24th of February, then, where did you have contact with Mr. Fellers?

A. At Mr. Fellers' house at 806 Westward Road in Lincoln.

Q. Were you alone or was someone with you?

A. I was accompanied by Sergeant Garnett.

Q. And what was your purpose for you and Sergeant Garnett going to 806 Westward Road?

A. A federal grand jury had returned an indictment for conspiracy to distribute methamphetamine regard - on Mr. Fellers and we went there to arrest him.

Q. Was this an apartment or a residence?

A. It's a home.

Q. Like a single-family residence?

A. Yes.

Q. When you got to this home, how did you make contact with Mr. Fellers?

A. When we walked up, the, what I call, storm door was closed but the - the main front door was open. We knocked on the storm door and waited for Mr. Fellers to come to the door.

Q. Who came to the door?

A. Mr. Fellers did.

Q. And when Mr. Fellers came to the door, what was the first thing that you and Sergeant Garnett did?

A. Acknowledged John and showed him our badge and commission cards identifying ourselves.

Q. At that time were you and Sergeant Garnett in uniform?

A. No.

Q. And at -- when you work with the narcotics task force, do you wear uniforms or plain clothes?

A. Plain clothes.

Q. Did Mr. Fellers appear to be able to identify you?

A. Yes.

Q. After you identified yourself as police officers, what was the next thing that happened?

A. Mr. Fellers -- we asked if we could come inside. He invited us inside. Sergeant Garnett and myself walked in and Mr. Fellers offered us a seat.

Q. Where did you sit?

A. I didn't sit.

Q. And did Sergeant Garnett sit?

A. I don't think so, but I don't remember for sure.

Q. Did Mr. Fellers sit?

A. He did.

Q. What room were you in?

A. I'd describe it as a living room which is the first room off the - the entrance to the residence.

Q. And when you entered into the living room, did Mr. Fellers immediately sit down?

A. Shortly thereafter, yes. I don't know if it was immediately. He walked to the couch and sat down, but it was within a minute or two.

Q. (Coughing) Excuse me. And did you explain to Mr. Fellers why you were there?

A. We did.

Q. What did you tell him?

A. I told Mr. Fellers that we were there to discuss his involvement regarding the distribution of methamphetamine. I then told Mr. Fellers, in fact, we had a federal arrest warrant - or the Grand Jury had returned an indictment regarding him for conspiracy to distribute methamphetamine.

Q. What -- after you told Mr. Fellers that he had been indicted, what did you or Mr. - you say or did Mr. Fellers have a response?

A. I believe I specifically said that this indictment was regarding his association with persons

such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, Mark Farfalla. At that point Mr. Fellers indicated to us that at that point in his life, which I took to mean at the point when he was associated with these persons, he had a lot of personal problems in his life.

Q. Did you begin questioning him about those personal problems?

A. No. Mr. Fellers began to offer us information regarding -- he started talking about how he was going through a divorce. He was having business problems with a former business partner.

Q. Did you ask him questions about his association with Kathi Kuenning?

A. No.

Q. Did you ask him questions about his associations or drug trafficking with Pat Sardeson?

A. No.

Q. Did you ask him any questions in that regard regarding Thomas Geffs?

A. No.

Q. Did you ask him any questions regarding I think it was Mark Farfalla?

A. No, I did not.

Q. Did you - you or Sergeant Garnett ask him any questions when he was talking about his problems, his

personal problems, regarding his drug trafficking?

A. Not regarding his drug trafficking, no.

Q. During the time that Mr. Fellers was - was discussing his - or telling you about his personal problems, was this still going on in the living area?

A. Yes, it was, the living room area.

Q. What did - what did his demeanor appear to be?

A. To me, it was pretty relaxed. Mr. Fellers was seated on the couch in the living room. He was drinking a mug of tea or something like that, water, a large mug that you get at a Kwik Shop. He seemed pretty relaxed, pretty intent on telling us that his problems, during the time period - or during the period that he associated with these people, brought him a lot of grief, I guess I would say.

Q. Did (coughing) - excuse me. Had you also had contact with Mr. Fellers in March of '99?

A. Yes, I did.

Q. Where did that take place?

A. Again, that was at Mr. Fellers' residence at 806 Westward Road.

Q. And have you ever heard the expression "knock and talk"?

A. Yes, I have.

Q. What does that mean?

A. It's a technique that we use regarding multiple aspects of police investigation. It's where we go to a residence -- this one specifically was dealing with a Crime Stopper allegation against Mr. Fellers back then -- we knock on the door, identify ourselves, discuss the allegations that have been made by whoever it is at that point that we're referring to was made by an unknown call to Crime Stoppers and go into it and question Mr. Fellers regarding that.

Q. On that occasion, did he talk to you?

A. Yes, he did.

Q. And did you arrest him after that?

A. No, we did not.

Q. Could you -- or do you recall approximately how long Mr. Fellers talked about his personal problems on February 24th?

A. Not exactly. I would -- my best estimate would be approximately five to ten minutes, somewhere in there.

Q. During that time, did he make any statements regarding drug or narcotics trafficking?

A. Did I?

Q. Did he?

A. He did admit that he had been using - using methamphetamine at the time period when he was associated

with Kathi, with Thomas Geffs, Pat Sardeson.

Q. And was that the statement that you earlier testified to?

A. Yes.

Q. Other than that, did he say anything?

A. Not -- no.

Q. And how did this conversation end?

A. Basically, it ended because, number one, we were pretty busy on that evening. There was a lot of radio traffic going on. We needed to take Mr. Fellers to jail so that we could move on with our day. It was ended by either myself or Sergeant Garnett, I don't know who, saying, John, we need to get going, we need to take you down to jail.

Q. And did Mr. Fellers, then, prepare to go to jail?

A. Yes.

Q. Do you remember how he got to the jail?

A. Yes.

Q. How was that?

A. Sergeant Garnett and I had to transport him in our unmarked police vehicle because there were no marked cruisers available. They were all out of service on other calls.

Q. And you and Sergeant Garnett, were you in the

same vehicle?

A. We were.

Q. During the period after the conversation ended - or after you've indicated - sorry - to Mr. Fellers - or you or Sergeant Garnett indicated that the conversation kind of needed to end because you needed to get on with your day, from that point until Mr. Fellers got into the car did you or Sergeant Garnett question him regarding narcotics trafficking?

A. No.

Q. Did Mr. Fellers continue to talk about his personal life to some extent?

A. He did.

Q. Was there anything in that that you found was related to his activities with the individuals you had earlier mentioned?

A. No.

Q. And during the time that Mr. Fellers was being transported to the jail, did you or Sergeant Garnett question Mr. Fellers?

A. Regarding narcotics? No. And we didn't question him specifically other than when we - when we went down to get his shoes. We questioned him about the guns.

Q. Not about drugs.

A. No, ma'am.

Q. Okay. And when -- again, on the car, was anybody interrogating or questioning Mr. Fellers during the car ride?

A. No.

Q. Was he talking during that ride?

A. He was.

Q. What was he talking about?

A. He was talking about a land dealing that he had, and I don't know if it was a former business partner or what, but it was - basically his involvement with some kind of land dealing that had either gone bad or hadn't turned out the way he wanted it to turn out.

Q. Was Mr. Fellers booked into the prison? Or actually the jail, I guess.

A. Into Lancaster County Jail, yes, he was.

Q. Did you and Sergeant Garnett have an opportunity to talk with him after that?

A. Yes, we did.

Q. Where did that take place?

A. It took place in a room adjacent to the book-in area at Lancaster County Jail, an interview room there.

Q. Who all was present for that?

A. Myself, Sergeant Garnett and Mr. Fellers.

Q. And why were you, Sergeant Garnett and Mr. Fellers in that room?

A. To conduct an interview or attempt to interview Mr. Fellers.

Q. Did Mr. Fellers indicate that he was willing to talk to you?

A. He did.

Q. Are you familiar with the Miranda warnings form?

A. I am.

Q. And what is the purpose of the Miranda warnings form?

A. The purpose is to advise someone that we have in custody that we want to, number one, interview them, but we advise them of their rights to remain silent, to have an attorney present with them during any questioning. And if they cannot afford an attorney, to have one appointed for them prior to any questioning.

Q. Did you advise Mr. Fellers of his rights?

A. Yes.

Q. Did you use a written form to do that?

A. Yes.

Q. And how did you use the written form?

A. I read each question, asking Mr. Fellers to respond yes or no to each question. I then wrote the

response by Mr. Fellers adjacent to each question. I signed it. Mr. Fellers signed it and Sergeant Garnett signed it.

MS. LIPOVSKY: May I approach the witness?

THE COURT: Yes.

Q. (By Ms. Lipovsky) Deputy Bliemeister, I've given you what is marked as Government's Exhibit Number 1. Have you seen that before?

A. Yes.

Q. What is Exhibit Number 1?

A. It is a photocopy of the Miranda warning waiver form that I use - or read to Mr. Fellers.

Q. Is that a true and accurate copy of the original?

A. It is.

Q. Whose handwriting appears on that document following the top until the line that's identified by the number 6?

A. That is my handwriting.

Q. Did you complete it at the time of the interview?

A. I did.

Q. And are there two signatures at the bot -- or actually there are three signatures at the bottom.

A. Yes.

Q. Is one of those yours?
A. Yes.
Q. And did you see Mr. Fellers sign this document?
A. I did.
Q. And does his signature appear on that document also?
A. Yes.
Q. And did you also see - you also see the signature of Mr. - Detective Sergeant Garnett on that?
A. Yes.
MR. LIPOVSKY: I would offer Exhibit 1.
MR. BRENNAN: No objection.
THE COURT: Received.
Q. (By Ms. Lipovsky) Where does Mr. Fellers' signature appear on the document?
A. Under the line premarked subject's signature. It's on the lower right-hand portion of the Miranda form.
Q. And where is your signature?
A. Directly adjacent to that on the line marked "witness."
Q. And can you advise the Court the questions that you asked Mr. Fellers regarding waiving his Miranda rights and his answers?
A. Yes. Would you like me to read them?

Q. Yes.
A. Okay. I want to advise you that I'm a police officer. Do you understand that? I wrote yes. That was Mr. Fellers' response. You have the right to remain silent, not make any statements or answer any of my questions. Do you understand that? Again, I wrote yes. Anything you may say can be and will be used against you in a court of law. Do you understand that? I wrote yes. You have the right to talk to a lawyer and have a lawyer with you during the questioning. Do you understand that? I wrote yes. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no cost to you. Do you understand that? I wrote yes. And knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? And, again, I wrote yes, which was Mr. Fellers' response.
Q. Did you proceed to ask Mr. Fellers some questions?
A. I did.
Q. And did Mr. Fellers respond?
A. Yes, he did.
Q. During the time that you were interviewing Mr. Fellers, did anyone else come into the interview?
A. No.

Q. Is one of those yours?

A. Yes.

Q. And did you see Mr. Fellers sign this document?

A. I did.

Q. And does his signature appear on that document also?

A. Yes.

Q. And did you also see - you also see the signature of Mr. - Detective Sergeant Garnett on that?

A. Yes.

MR. LIPOVSKY: I would offer Exhibit 1.

MR. BRENNAN: No objection.

THE COURT: Received.

Q. (By Ms. Lipovsky) Where does Mr. Fellers' signature appear on the document?

A. Under the line premarked subject's signature. It's on the lower right-hand portion of the Miranda form.

Q. And where is your signature?

A. Directly adjacent to that on the line marked "witness."

Q. And can you advise the Court the questions that you asked Mr. Fellers regarding waiving his Miranda rights and his answers?

A. Yes. Would you like me to read them?

Q. Yes.

A. Okay. I want to advise you that I'm a police officer. Do you understand that? I wrote yes. That was Mr. Fellers' response. You have the right to remain silent, not make any statements or answer any of my questions. Do you understand that? Again, I wrote yes. Anything you may say can be and will be used against you in a court of law. Do you understand that? I wrote yes. You have the right to talk to a lawyer and have a lawyer with you during the questioning. Do you understand that? I wrote yes. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no cost to you. Do you understand that? I wrote yes. And knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? And, again, I wrote yes, which was Mr. Fellers' response.

Q. Did you proceed to ask Mr. Fellers some questions?

A. I did.

Q. And did Mr. Fellers respond?

A. Yes, he did.

Q. During the time that you were interviewing Mr. Fellers, did anyone else come into the interview?

A. No.

Q. And during the time of this interview, did either you or Detective Garnett leave?

A. No.

Q. (Coughing) Excuse me. At any time did Mr. Fellers request to have an attorney present before answering any questions?

A. He did not.

Q. Did you promise anything to Mr. Fellers in return for him making a statement?

A. No.

Q. Did you make promise, direct or implied, to Mr. Fellers that a confession or admission would result in benefit or advantage to him?

A. No.

Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?

A. No.

Q. (Coughing) Excuse me. Did Mr. Fellers appear to understand what you were saying to him when you read him his rights?

A. Yes, he did.

Q. Did Mr. Fellers ever invoke his right to remain silent?

A. He did not.

Q. Did Mr. Fellers' responses during this interview appear to follow the questions that you were asking?

A. Yes.

Q. Did he appear to understand the questions that you were asking?

A. Yes, ma'am.

Q. And did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?

A. Yes.

Q. And did he appear to freely, voluntarily and intelligently waive his right to have an attorney present?

A. Yes, ma'am.

Q. Did -- or do you recall, actually, the questions that you asked Mr. Fellers during this interview?

A. I do.

Q. And can you advise the Court of the questions you asked and his responses.

A. I can.

Q. Could you do that, please.

A. Initially, I began to question Mr. Fellers regarding his involvement with an individual by the name

of Thomas Geffs. Thomas Geffs is also known by Slick; it's a nickname that he goes by. And Mr. Fellers acknowledged that he knew Thomas Geffs by the nickname of Slick. I asked Mr. Fellers if he had ever obtained methamphetamine from Slick and he said that he had not.

I then moved my questioning to a person by the name of Patrick Sardeson. Again, Mr. Fellers said that he knew Patrick Sardeson and also indicated that he had met Thomas Geffs through Patrick Sardeson. I believe, at one point in time, he said that the two had been living together.

I asked Mr. Fellers if he obtained methamphetamine from Pat Sardeson and he said that he had. He specifically indicated that he had obtained gram one-eighth ounce, described them as user quantities of methamphetamine, from Patrick Sardeson.

I asked him if he knew of any of the methamphetamine that he had got from Pat Sardeson had come from Thomas Geffs. He said that on one occasion he believed - he didn't know for sure, but he believed - a gram that he had got from Pat had come from Thomas Geffs.

We then moved our questioning to an individual by the name of Kathi Kuenning.

Q. First, did you ever ask Mr. Fellers if he'd received ounce quantities of methamphetamine from Patrick

Sardeson?

A. Yes, I did.

Q. Okay. And what was his response about that?

A. He had not.

Q. Okay. I'm sorry to interrupt you. You said you asked him questions about Kathi Kuenning?

A. Yes.

Q. And what did you ask him? What was Mr. Fellers' response?

A. Mr. Fellers again said that he had known Kathi Kuenning for a long time. They were personal friends. My questioning specifically dealt with his involvement with Kathi regarding the sale of methamphetamine. He indicated that he had obtained methamphetamine in, again, user quantities from Kathi in the past. I think I specifically questioned him whether or not he had received, again, ounce quantities from Kathi and he said no way had he -- he said that he had obtained gram one-eighth ounce quantities from her but nothing more than that. I asked him if he had ever seen Kathi in possession of additional quantities of methamphetamine and he said that Kathi always had quite a bit of meth on her. I asked him specifically if he had ever seen her in possession of ounce quantities. He said that he had. I would - kind of went up the scale from there asking if he

had ever seen her in possession of quarter-pound quantities. He said no that he had not. But he did indicate that he had seen her in possession of two-ounce quantities of methamphetamine, and I can't specifically remember on how many occasions or if he detailed how many occasions that was on.

At that point, I had previous information I was the person that had done - given the Grand Jury the testimony regarding Mr. Fellers. I knew quite a bit about what people had alleged against him during the proffer interviews I had conducted with him and by reading reports of other officers.

I asked Mr. Fellers if he had been supplying Kathi Kuenning with money to purchase methamphetamine. Mr. Fellers said that he had been supplying money to Kathi but he did not know or did not believe that it was for the - for methamphetamine specifically. In fact, he went on to say that he remembered giving her money on at least one occasion to pay a cellular phone bill that Kathi needed to pay to keep her cell phone on.

I think at that point in the interview we moved on to questioning regarding other persons, one being a Mark Farfalla. Mr. Fellers said that he had known Mark Farfalla for quite some time. He had known his sister, Mark's sister, Shelly Farfalla, who lived in Omaha also.

I asked Mr. Fellers where he had met Mark or how he'd become associated with Mark. And he said while on work release or in prison, I can't remember which one, he had met Mark Farfalla.

I specifically questioned him regarding obtaining methamphetamine from Mark Farfalla.

Q. Did you ask him about obtaining methamphetamine in December of 1998?

A. Yes. That was the time period that I was questioning in regard.

Q. And what was his response?

A. He indicated that -- he went into this story about how he had become reacquainted with Mark Farfalla. He and Kathi had traveled to Omaha, Nebraska and they were at a convenience store or grocery store or something there. And he said it was just a chance meeting that he had run into another old friend of his that was an associate of Mark Farfalla. They began talking about Mark and this friend was either planning on going over to Mark's house or they went to Mark's house. But, in any event, Mark, this friend and Kathi traveled over to Mark Farfalla's residence in Omaha, Nebraska.

I started questioning regarding whether or not that he had made - or got methamphetamine from Mark on this occasion. And Mr. Fellers was pretty evasive about this

question, basically saying that they had used methamphetamine with Mark, with Kathi on this date but whether or not he directly obtained it from Mark, I don't recall him saying that.

I questioned him regarding whether or not Kathi Kuenning had ever been - or he had made the introduction of Kathi Kuenning to Mark Farfalla for the sole purpose of obtaining methamphetamine. John said at this point in time he knew that Kathi was selling methamphetamine. And I believe later -- I'm trying to think exactly how he said it -- in any event, Mr. Fellers basically said that Kathi had obtained methamphetamine from Mark Farfalla later on. But whether or not the introduction by him to Mark - or by Kathi - by John Fellers to Mark Farfalla and Kathi Kuenning, the introduction of those two was specifically for the intent of Kathi to get another source, that information was not fully - it wasn't -- he said it was not that - for that reason.

Q. Did you discuss with Mr. Fellers any phone information that you had linking him and Mark Farfalla?

A. I did.

Q. And what was that conversation?

A. I told Mr. Fellers that I had, through the course of this investigation, I had phone information that I believed connected him to Mark Farfalla and

discussing purchasing narcotics. Again, Mr. Fellers said that at this point in his life, meaning this time period in his life, he was a heavy user of methamphetamine. He had a lot of personal problems. Things were a little bit unclear in his memory. He did say that he believed he may have had a phone contact on one occasion at least and possibly more where he said that they had made reference to obtaining a package of meat. John told me he knew what Mark was talking about. They were talking about obtaining methamphetamine. But when I questioned John further regarding this, he really - he was evasive in his questioning - or evasive in his answers, not wanting to commit one way or another to - whether or not he had obtained methamphetamine directly from Mark Farfalla.

Q. Did you ask Mr. Fellers about fronting money to anyone?

A. I did. Part of this case information that I had previously had - had gone to the Grand Jury with was that basically John was bankrolling Kathi Kuenning, supplying her money. She would make the purchases of methamphetamine from Mark Farfalla, among others, with both his money and money that she had. He, again, said yeah, I loaned Kathi Kuenning some money, specifically bringing up the instance of the cellular phone bill.

I questioned him further regarding this and he

indicated that he had loaned Kathi money on - on more than one occasion. He said that he had bonded her out of jail when she was arrested on State charges for delivery of a controlled substance. He said he had his suspicions about where some of this money was going, but he never asked Kathi. He never got a concrete answer, yes, this was for methamphetamine and I need to pay off a drug debt or I need to get more methamphetamine. He just said he loaned her money. She was a very good friend. One reason was for the phone bill. He had his suspicions that some of this was for narcotics but didn't know for sure.

Q. Did you ask Mr. Fellers any questions about a person whose name is Val?

A. Yes, I did.

Q. What was the question -- what were the questions and what were Mr. Fellers' answers?

A. Val was another person that I knew from previous parts of this investigation, was a source for methamphetamine for Kathi Kuenning after Mark Farfalla had went to prison in early 1999 for possession with intent to distribute methamphetamine. I told -- I asked if he had ever met Val, who I knew to be a source from a proffer interview conducted with multiple persons in this case. He said he didn't think that he had. Maybe on one

occasion he had met her. I asked if he had ever got methamphetamine directly from Val. He said that he had not.

Q. And, I'm sorry, did you already say who Val actually was, if you were able to identify who Val was?

A. Val -- I know Val's last name. Her name is Valerie Green. She liv -- at that point in time, she resided in Omaha. We have never had -- we haven't had any direct contact with Val as part of this investigation, only through -- we've identified her through Kathi Kuenning's testimony and also through analysis of cellular tolls.

Q. Did -- were you present when Detective Sergeant Garnett asked any questions of Mr. Fellers?

A. Yes, I was.

Q. Do you recall what was asked and Mr. Fellers' response?

A. Yes. Sergeant Garnett began questioning and John had indicated to us on multiple different points during this interview that he was a heavy user. Sergeant Garnett basically asked him about his use, how it started, how he used and believe he initially began -- I can't say for sure; I don't remember how he initially began using it. But at some point in time, he began smoking methamphetamine on tin foil. Later, he said that

Kathi Kuenning had shown him how to bang - or to inject methamphetamine into the blood stream, and he said that that's how his use had progressed from smoking to now injecting. And he indicated that at some points during the time period when he was dealing with Kathi, he was injecting at least a quarter gram at a time.

Q. Did Mr. Fellers make some more comments about his personal and business problems at that point?

A. Yeah. Again, that was kind of hit and miss throughout this interview where Mr. Fellers was talking about his problems with his ex-wife, his problems of his ex-business partner.

Q. Um, how did you respond to Mr. Fellers' statements during this after he'd been telling you this information?

A. Just -- from based upon extensive research that I had done in this investigation, all the different interviews and Mr. Fellers' statements to this point, you know, I thought that Mr. Fellers was - was telling us about half the story, you know. I didn't -- in my mind, I did not believe that Mr. Fellers could be fronting all this money to Kathi. Kathi would show him these additional quantities of methamphetamine. He knew that she was getting it from Mark Farfalla and I just didn't believe that his involvement had - had stated that based

upon his information that he'd given me and then all the other interviews that I had done. I told John this: that I believed he was splitting hairs, that he wasn't being a hundred percent truthful, that he was, you know, on the right road, but not - not completely coming forth.

Q. Did you continue to - the interview at that point?

A. There may have been some more interview regarding the fronting of the money to Kathi Kuenning, the borrowing of the money, trying to actually delineate exactly what the money was for, how much money it was, but at some point, this was pretty much the end of the interview.

Q. That additional information, was it basically reflective of what he'd already told you and what you've already testified to?

A. Yes, ma'am.

Q. Did you ever ask Mr. Fellers again if he sold methamphetamine to Patrick Sardeson?

A. I did.

Q. And what did he say?

A. He said he'd never sold it to him.

Q. Did you ask him if he ever shared it with him?

A. I did.

Q. And what did he say?

A. He said he had shared methamphetamine with friends and Patrick Sardeson was one of those people he'd shared methamphetamine with.

Q. Did the name Leon Thompson come up?

A. Yes.

Q. And what did Mr. Fellers say about Leon Thompson?

A. Leon Thompson, another person I knew associated with this investigation, I brought Leon Thompson's name up to Mr. Fellers. Mr. Fellers said, yeah, I know Leon, he's a friend. Asked him if he had sold methamphetamine to Leon. He said he'd never sold. He said that he had shared methamphetamine with Leon.

Q. Did Ernest Lawrence come up?

A. Yes.

Q. How did that happen?

A. Mr. Lawrence was a person that I had interviewed during this case during a proffer interview. I had infor - had information that John had possibly sold him methamphetamine on one occasion so I asked John if he'd ever sold methamphetamine to Ernie Lawrence. He said that he had not.

Q. Was there -- were there any other questions that were asked of Mr. Fellers that - specifically regarding narcotics that you recall at this time?

A. Not anything more specific than what I've just testified to.

Q. Was there any other information that he provided that you recall at this time that you've not already testified to?

A. No.

Q. At the end of the interview, then, what did you and Sergeant Garnett do?

A. At the end of the interview, as we always do in interviews such as these, or at least I always do, I told John about the charges that he was facing. I told him that he would be brought in front of a magistrate and that his release or conditional release would be based upon that appearance. I told John if he'd be appointed counsel or he'd - he would have to buy or pay for counsel. And I told him that if he did not believe that he was involved in the distribution of methamphetamine to let his attorney know this and that - to take this case to court. I did tell him, though, that if he felt that his involvement was more or he felt his involvement in the distribution of methamphetamine was significant, that he should disclose this a hundred percent to his defense attorney and that we would be interested in doing what is called a proffer interview with Mr. Fellers, then explained what a proffer interview was.

Q. Did that finish the interview that you had with Mr. Fellers on that date?

A. It did. I guess to clarify that it finished the interview in that room, brought Mr. Fellers back out to the booking area. I told John that I wasn't going to book him in on these firearms that we had found in his residence at this time. And he all -- basically, there was some conversation that if the county attorney chose not to prosecute, he would like to have these turned over to his family in Lexington, Nebraska.

Q. Did all this occur in Lincoln, Nebraska?

A. It did.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross-examination?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. You indicated that you first met Mr. Fellers in 1995 when you were doing volunteer work at Lincoln General Hospital?

A. That is correct.

Q. Were you both doing volunteer work at that time?

A. Yes.

Q. And how well acquainted did you get with him then?

A. I can only specifically remember meeting him on one occasion.

Q. What type of volunteer work was this?

A. Well, it was in the intensive care unit of Lincoln General Hospital, BryanLGH West, I guess, now, kind of a family liaison type of thing for critical care patients up there.

Q. And when you had your next meeting with him in March of 1999, did you recognize him at that time from that previous occasion at Lincoln General?

A. I did, yes.

Q. Did you --

A. I had also seen pictures prior to contacting John and recognized, yeah, this is the same person.

Q. Okay. And did you mention that to him? Did you talk about your previous acquaintanceship?

A. I think that I did in March of 1999. I think I remember talking to him and telling him that I had met him up there.

Q. And your contact with him in March of 1999, that was specifically on March 11, 1999?

A. I believe -- I'd have to review the ACI to say it was exactly that date.

Q. Okay. You generated an additional case information report as a result of that contact?

A. I didn't, no.

Q. But there was one prepared by another officer?

A. Yes, there was.

Q. That would have the date that you got the Crime Stopper call and the date that you had the contact?

A. Yes, it would.

MR. BRENNAN: May I approach the witness, please?

THE COURT: Yes.

Q. (By Mr. Brennan) I'm showing you a document that's captioned "Lincoln Police Additional Case Information." Is that correct?

A. It is.

Q. And is that the ACI that you referred to concerning the March '99 contact?

A. It is.

Q. And does it indicate that the Crime Stopper call came in on December 12, 1998?

A. Yes.

Q. And that surveillance was conducted on Mr. Fellers' residence on that date?

A. Surveillance was conducted on the 28th of 1998 and the 16th of January, 1999.

Q. And then later on March 11, 1999 you actually contacted him and spoke with him.

A. That is correct.

Q. On that March 11, 1999 occasion were you dressed in plain clothes the way you were when you talked with him in February of 199 - 2000?

A. A similar dress, yes.

Q. And did you arrive at his residence in an unmarked vehicle on that occasion?

A. Yes.

Q. Were you alone?

A. No.

Q. So you were with another officer, a Lincoln police officer?

A. Yes, I was.

Q. That was Officer Dalton?

A. Correct.

Q. And he was also dressed in plain clothes?

A. He was.

Q. And you knocked on the door on that occasion?

A. Yes.

Q. And Mr. Fellers answered the door?

A. Yes.

Q. And you showed him your badge and your commission card?

A. That is correct, sir.

Q. And so did Officer Dalton?

A. Yes.

Q. And you told him that you were there to talk to him about drug activity?

A. The investigator -- it was Investigator Dalton's case; it was assigned to him. The majority of the talking initially was done by Investigator Dalton.

Q. And what Investigator Dalton told him was is that they - that you had this report that he'd been involved in some drug activity?

A. That is correct.

Q. And that that's what that - you were there to talk to him about?

A. Yes, sir.

Q. And you asked him if he would agree to talk to you?

A. Basically. I don't know if that specific words were mentioned. We got - we do these Crime Stopper things all the time. We indicate that the allegations are made to Crime Stoppers by an unknown caller, not by the Lincoln Police Department, and told him that we wanted to discuss these allegations with him basically.

Q. And to search his residence?

A. We did ask consent - or Investigator Dalton

asked consent to search his residence, that is, yes.

Q. And he allowed you to search his residence?

A. He did.

Q. And he answered your questions?

A. He did.

Q. And there was no evidence found during the search?

A. No, sir.

Q. And how long did that contact last?

A. I really can't remember for sure. It's a long time ago.

Q. What does -- what would you estimate that would have taken?

A. Half hour or less.

Q. But when you contacted him again, the last time, that was February 24, 2000.

A. Yes, sir.

Q. And you went to his residence with a Lincoln police officer, and each of you were dressed in plain clothes?

A. Yes.

Q. Driving an unmarked vehicle.

A. Yes.

Q. And you knocked on the door again.

A. Yes, sir.

Q. And Mr. Fellers answered the door.

A. Yes.

Q. You again showed him your badges and your cards, the way you had done previously?

A. Yes.

Q. Except this time you told him that you had a federal warrant for his arrest.

A. That is correct, sir.

Q. And the first thing you told him was that you needed to discuss with him his involvement in the use and distribution of methamphetamine.

A. That is correct.

Q. And then the very next statement you made to him was that he'd been indicted by a federal grand jury, that you had a warrant for his arrest and that you were there to arrest him.

A. That's the general context of that, yes, sir.

Q. So it's clear that that was the ultimate purpose of going there was to arrest him.

A. That was the purpose.

Q. And it's clear that that was what you made a point of telling him when you began your conversation with him.

A. Yes, sir.

Q. And at that time did you advise him of his

right to remain to silent?

A. No, sir.

Q. And at that time did you advise him of his right to have an attorney present during questioning?

A. I did not.

Q. And in response to your comment of wanting to discuss his use - his involvement in the use and distribution of methamphetamine, he sat down and asked you what you wanted to talk about.

A. No, not specifically. He did sit down - he did sit down at some point, yes.

Q. And he offered you a seat.

A. He did.

Q. To discuss whatever you needed to discuss.

A. That is correct.

Q. And that's when you told him that you wanted to talk to him about Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. After I had told him that we had a federal indictment for his arrest regarding his involvement with the people that you have just mentioned, sir.

Q. Okay. And that you wanted to talk to him about his involvement with those people.

A. I guess, could you clarify the question a little bit further?

Q. He asked you to sit down to discuss whatever you wanted to discuss.

A. Yes.

Q. He sat and you didn't.

A. That is correct.

Q. You told him you wanted to discuss his involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. Yes.

Q. And he indicated to you that he knew those people.

A. He did.

Q. Well, you didn't go person by person, but in general he responded that he knew who you were talking about.

A. I took it to mean that because he responded by saying at that point in my life, meaning when he was associated with these people -- and, like I told Miss Lipovsky, that's when he started talking about a lot of personal problems in his life.

Q. And at that time did he identify Thomas Geffs by that name or did he refer to him as somebody named Slick?

A. I think he referred to him as Slick.

Q. And did you refer to that person as Slick as well?

A. I said Slick is Thomas Geffs.

Q. And was this conversation that you had with him there at his residence tape recorded?

A. No, it was not.

Q. And at that time the statements that he made to you amounted to using methamphetamine?

A. Not only -- he was talking about how his life was in disarray, I guess is the general consensus of what I took. Included in that, not only with his problems with his ex-wife, his business partner, was that he was using methamphetamine, yes.

Q. But not involved in the distribution of it.

A. No. In fact, to the best of my recollection, there was no conversation about his distribution of methamphetamine.

Q. And at that time, you indicated that he was drinking something from a mug.

A. Yes.

Q. Do you know what it was?

A. I don't know for sure.

Q. Did you ever look in the mug to see what it was?

A. No.

Q. And you arrived at the residence and knocked on the door at 1624 hours?

A. Yes.

Q. And you left the residence to take him to the jail at 1639 hours?

A. I'd have to refer to my report specifically, but it does - that time does sound right.

Q. So the time you spent with him there at the house before leaving was 15 minutes.

A. Roughly, yes.

Q. During the time that -- what type of car was it that you had?

A. We switch cars a lot.

Q. Do you remember?

MS. LIPOVSKY: Objection. Relevance as to specifics.

THE COURT: Sustained.

Q. (By Mr. Brennan) During the time that you were in whatever car you were in, was - were either you or Detective Garnett in possession of a tape recorder?

A. No.

Q. Is there any tape recording that you're aware of of the conversation in the car?

A. No, sir.

Q. Do you remember what time you arrived at the jail?

A. I can testify to the time that we read him Miranda, but exactly what time we arrived at the jail, it would have been in the near vicinity of 5 o'clock, not -- I can't say to the minute, sir.

Q. And when you say 5 o'clock, you're referring to 5 o'clock in the afternoon.

A. Yes, sir.

Q. Did you book him into the jail before the interview?

A. By booking -- what do you specifically mean by booking him in, sir?

Q. What do you mean when you say booking?

A. When I say booking, I mean thumbprints, photographs, the whole process. All that had not been done. We had brought Mr. Fellers out, I typically do, any arrest that I do whether it's for whatever, is I bring him up, have him stand in front of the main booking area desk and tell the jailers who he is so they can start the paperwork process. I know that he had not been photographed or fingerprinted before we talked to him, but his presence was made known to the jailers.

Q. At that time, did someone search him and take his property from him and --

A. Yeah, in the general context of all that, but, again, whether or not -- I know the people who are lodged on narcotic warrants are strip searched as a matter of practice by the jail. Now, whether or not Mr. Fellers was strip searched before we talked to him or after we talked to him and whether all of his property had been removed, I cannot remember.

Q. How long did the jail interview take?

A. I would say approximately a half hour from the time that we read the Miranda form to John until he was turned back over to the jail staff and we left.

Q. And that occurred in an interview room right off to one of the sides of the booking desk?

A. Yes, sir.

Q. Do you remember which room it was?

A. I do not. There's three rooms there.

Q. Was that interview date recorded?

A. It was not.

Q. At that time, were either you or Detective Garnett in possession of a tape recorder?

A. We were not.

Q. And during that jail interview, the same names that you mentioned to him at his house were brought up.

A. Yes. Those are the names of the people that had - brought to the Grand Jury that I had known about

who I had interviewed, yes, they were.

Q. And they were brought up in the context of Mr. Fellers' knowledge of them and association with them.

A. At which point, sir?

Q. During the jail interview.

A. Okay. Yes, they were.

Q. And specifically in connection with Mr. Fellers' use and/or distribution of methamphetamine.

A. Yes.

Q. And during your previous testimony, the only names that I gather weren't mentioned at the house were the names of Valerie Green and Leon Thompson; is that right?

A. No, there were others. Shelly Farfalla.

Q. Okay. He indicated he knew -- when you were asking him about Mark Farfalla, he said he knew Mark and his sister Shelly?

A. That is correct.

Q. Okay. But the names that you brought up -- you didn't bring up Shelly's name; Mr. Fellers did that.

A. Yes.

Q. The names that you brought up that you didn't mention to him while you were at his house were Valerie Green and Leon Thompson.

A. Yes.

Q. During your interview with him, he never used the word "fronting" money, did he? He said he loaned money.

A. That is correct.

Q. So the word "fronting" were - those were words that you were using here today or using then but those weren't his words.

A. Those were my words that I used then and today, yes.

MR. BRENNAN: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. When did the name Ernie Lawrence first come up?

A. At the jail.

Q. So that was another name that came up there but not at the house?

A. Yes.

Q. (Coughing) Excuse me. Um, when you contacted Mr. Fellers at his home and he invited you in, did you begin to interrogate him regarding his association with narcotics and narcotics trafficking?

A. No.

Q. When Mr. Fellers was seated in his living

room, where were you and Detective Garnett standing in relation to him?

A. Where Garnett - or Detective Garnett was standing, I can't specifically remember. I remember standing -- Mr. Fellers was seated on the couch. There was a coffee table or some type of table in the living room, and I was on the other side of that table facing Mr. Fellers.

Q. Was Detective Sergeant Garnett standing directly next to Mr. Fellers?

A. No.

Q. Was there a space, then, between you, Detective Sergeant Garnett and Mr. Fellers?

A. Yes.

Q. During the time that you were at Mr. Fellers' house, did he appear to be intoxicated?

A. No.

Q. During the time that you were transporting him and talking to him in the jail, did he appear to be intoxicated?

A. No.

Q. Did you smell any alcohol or anything that would indicate that he had been drinking anything other than a simple non-alcoholic beverage at his home?

A. I smelled no odor of alcoholic beverage and no

signs that Mr. Fellers was intoxicated.

MS. LIPOVSKY: I don't have any more questions.

EXAMINATION

BY THE COURT:

Q. Sir, when you arrived at the residence, it's my understanding from your earlier testimony that your first comment to the defendant was that you wanted to discuss his dealings with methamphetamine; is that correct?

A. That is correct, sir.

Q. Your second comment to him was advising him that he was under arrest - or you had a warrant for his arrest?

A. Yes, sir.

Q. All right. And your third comment was that the indictment returned by the Grand Jury had to do with his involvement with certain individuals; is that right?

A. Yes. As I remember it specifically when we entered we asked him the first statement and then the next was just kind of a, you know, a continuation. In fact, I remember - in fact, the Grand Jury returned an indictment for conspiracy to distribute methamphetamine regarding your involvement with the people that I've named: Kathi Kuenning, Pat Sardeson, Mark Farfalla and

Thomas Geffs.

Q. All right. When you -- in the normal course of your dealings as a narcotics agent, when you arrest someone, do you advise them of the specific background of the charges?

A. In these cases, the federal cases, the lengthy ones, yes, I do. Regarding who it is involved with, yes.

Q. Why is that?

A. Specifically, it's just part of what - the whole speech that I give them.

Q. Is it part of your training to give them that speech?

A. No, not part of my training, sir.

Q. When you mentioned names to the defendant at his home that day, did you expect that he would respond?

A. No. I expected that he -- this was a long time ago. This was back in 1998. It had been almost two years prior and that was part of why I said his involvement with these persons. Most of these persons had been incarcerated for a considerable amount of time. And, in fact, people in conspiracy - historical conspiracy cases, when we contact them, you know, they always think that it's something that's happened right now. And it's not. It's things that have happened in the past.

Q. Were you surprised that he made comments in response to your comment?

A. No.

Q. Tell me again, if you will, the persons that you talked about at the jail that had not been talked about at the home.

A. Valerie Green, Leon Thompson and Ernie Lawrence and also Shelly Farfalla.

Q. As I recall your testimony, you also stated that you did not talk about fronting money at the home, but you did talk about it in the jail interview; is that correct?

A. That is correct.

Q. Were there other subjects that you talked about in the jail interview that you did not talk about at the home?

A. Yes.

Q. What were those?

A. Specifically, Mr. Fellers' involvement in the distribution of methamphetamine. And then I specifically made reference using what I knew previously through the case to question him about each specific person that I had mentioned.

Q. Was there some reason, back at the home again, that you did not sit down when he invited you to sit?

A. Yes.

Q. And what was that?

A. Often, we're invited to sit down. For officer safety reasons, I never sit down in a house. That is part of my training. Just never do it.

Q. Is that the only reason?

A. That is the only --

Q. Officer safety?

A. That is the only reason, sir.

Q. Did your training ever concern the psychological effect of talking to someone while you're standing and they're sitting?

A. Yes, I have had training regarding that.

Q. Was that also part of the reason that you didn't sit down?

A. It wasn't, sir.

Q. I take it at the time of the home interview that the defendant was not free to get up and move around at his leisure; is that correct?

A. No, sir.

Q. No, it's not correct --

A. No, this is --

Q. -- or no, he wasn't?

A. He wasn't. He wasn't free.

Q. All right. So if he'd done that, you would

have restricted his movement; is that right?

A. Yes. There was some things that happened after the fact that -- he asked to get his shoes.

Q. Yes.

A. Okay. Yes, that is correct.

Q. All right. I guess I'd better have you amplify on that, the fact that at the conclusion Detective Garnett advised him that it was time to go; is that right?

A. I can't say for sure if it was Detective Garnett or I, but we both came to the understanding that yes, it was time to go. I can't remember specifically who said, John, it's time to go, let's wrap --

Q. Okay. And so then what happened?

A. He said, can I get my shoes? And Mr. Fellers had been, you know, laid back, cooperative to this point. He had -- and I said, sure. He said, my shoes are downstairs. I said, John, you're under arrest. Wherever you go in the house, I need to go also. And while walking down the stairs, I made a comment, again, for officer safety, you don't have any guns in the house, do you? And that's how it was said. You don't have any guns in the house.

Q. All right. But in any event, the reason that you were with him was because he was under arrest; is

that correct?

A. Yes, sir.

Q. All right. That's all the questions that I have.

THE COURT: Are there questions on my questions?

Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Regarding sitting and standing, was Mr. Fellers told he had to sit down?

A. No.

Q. Was he free to stand?

A. Yes, sir - or yes, ma'am.

Q. Whose decision was it that Mr. Fellers sat?

A. That was Mr. Fellers' decision.

Q. And did you place yourself while you were standing in a proximity to Mr. Fellers that would have been close enough to intimidate?

A. No.

Q. When you were standing, was your intent to intimidate Mr. Fellers into talking to you?

A. It was not.

Q. And did your position seem consistent with the

training that you had received regarding the psychological impact of standing while talking to a seated person?

A. No.

Q. It wasn't consistent with that?

A. Where I was standing?

Q. Yes.

A. It was not consistent with the training I received regarding the psychological interviewing of subjects.

Q. I want to clarify that, if you can, because I think I asked the question very poorly.

A. Well, basically, what we're taught in situations such as that, and it's not so much specifically that I've been taught about a standing or a sitting suspect. It's when conducting an interrogation of a suspect, the way that you are seated adjacent to them and that is the - interrogation goes on of slowly moving in in closer proximity to that person as you're interviewing as part of the psychological effects of that. But I maintained my distance from Mr. Fellers when I was standing. I just don't sit down in somebody that's we're going to arrest's house.

Q. Did you change your position while Mr. Fellers was talking about his personal problems and going on

about that?

A. I did not.

Q. Did Mr. Fellers' demeanor change in the area, the difference in his relaxed state?

A. No.

Q. And, if I could clarify, when you were answering the judge's questions, the first comment that was made was that you were there regarding his involvement with methamphetamine. And then the way I understood you answered, it was that kind of the fact you had a warrant and who it was about. Was that all one kind of continuous statement or was there a break there? Do you recall?

A. As I recall saying, you know, I came in, I made the statement, John, I'm here to discuss your involvement in the distribution of methamphetamine. In fact, the Grand Jury has returned an indictment regarding your involvement with those people that I mentioned. That was just a continuous kind of - or a statement that I made.

Q. And you say here today, "those people that I mentioned." At that point, was it the first time you brought up those names?

A. Yes, that was the first.

Q. And then following that, did you say to Mr.

Fellers, you have to answer our questions?

A. No, ma'am.

Q. Did you begin asking him specific questions?

A. No, ma'am.

Q. Did Mr. Fellers just kind of make a comment about that was a long time ago and all these problems?

A. Exactly.

Q. And after that, did you again at the home question him about those people specifically?

A. No, never at the home.

Q. Did Mr. Fellers continue to make statements about his personal problems?

A. He did.

Q. Did any of those things, those statements that he made, have anything to do with those individuals and narcotics trafficking?

A. No.

Q. Other than the one comment about --

A. Other than that he was using at the time period that he was dealing with these people.

Q. While Mr. Fellers was talking to you, was he handcuffed?

A. No.

Q. Physically restrained?

A. No.

Q. Asked questions designed to elicit incriminating responses?

A. No, ma'am.

Q. And when he finally was going to be removed from the home, the restriction on him was simply that he had to have a chaperon, for lack of a better word.

A. When we went down to get his shoes; is that --

Q. Yes.

A. Yes.

Q. And there wasn't any other time when he was physically restrained from going anywhere, was he?

A. No.

MS. LIPOVSKY: I don't have any more questions.

THE COURT: All right. Mr. Brennan.

MR. BRENNAN: Thank you.

FURTHER CROSS-EXAMINATION

BY MR. BRENNAN:

Q. The room that you're in, it's a living room at the house.

A. Yes.

Q. And what are -- what's the size of the room, in your estimation in feet?

A. I'm not real good at that. I suppose not quite as big from wall to wall as this - from the jury -

from the end of the jury wall to this wall, not that big. I'm not real good at estimating size and feet.

Q. You're saying that it's not as wide or as long?

A. I'm talking as wide, as from the end of the jury box to this wall, it's less wide than that, I think, but pretty close, pretty similar.

Q. Maybe from the far corner of the bailiff's - or the courtroom deputy's desk to where you're sitting?

A. To the end of where I'm sitting, yes.

Q. Four-and-a-half strides?

MS. LIPOVSKY: Well, I guess I'll object to the form of that question. A stride.

THE COURT: Sustained. Let's go back to feet.

MR. BRENNAN: May I?

THE COURT: Yes.

Q. (By Mr. Brennan) From about where I'm standing here to the corner of the witness stand that you're sitting in?

A. I'd say to this wall.

Q. And you can't tell us approximately how many feet that is?

A. Sir, this is the second time I've been in Mr. Fellers' home. I could not tell you the size of my living room in my home. It's just nothing that I've

ever --

Q. He was seated in a chair or on a couch?

A. On a couch.

Q. And there was a coffee table in front of the couch?

A. Yes.

Q. And you were standing on the other side of the coffee table.

A. Yes, sir.

Q. Within a few feet.

A. Yes.

Q. And Detective Garnett was standing beside you.

A. I can't say if he's directly beside me. I, you know, have to ask Detective Garnett exactly where he was standing.

Q. And you were each armed with service weapons.

A. We were.

Q. And you're not trained when you make an arrest to say, "we're here to discuss" or to preface your remarks with that phrase; is that right?

A. That is correct.

Q. But that's what you did in this case.

A. That is.

MR. BRENNAN: That's all.

THE COURT: All right. You may step down.

MS. LIPOVSKY: Your Honor, I have one other question about something that wasn't brought up before that Mr. Brennan asked.

THE COURT: What was that?

MS. LIPOVSKY: About the service weapons.

THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Did you have your service weapons drawn?

A. No.

Q. Were they visible at that time?

A. They were not.

Q. Thank you.

THE COURT: Anything on that?

MR. BRENNAN: No.

THE COURT: All right. You may step down.

MS. LIPOVSKY: I have one other witness. Do you want me to call him now?

THE COURT: Let's take a quick break. We'll be in recess for ten minutes and resume at the same spot.

* * * * * *

Whereupon, after a ten-minute recess, the following proceedings were had:)

THE COURT: You may call your next witness.

MR. LIPOVSKY: Thank you. And I forgot to ask, Your Honor, if the other witness could be excused.

MR. BRENNAN: No objection.

THE COURT: All right. Yes, he may.

Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Michael A. Garnett, G-a-r-n-e-t-t.

THE CLERK: Sorry, could you respell the last name.

THE WITNESS: G-a-r-n-e-t-t.

THE CLERK: Please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I do.

THE CLERK: Please have a seat in the witness chair.

THE COURT: Go ahead.

MICHAEL A. GARNETT

having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. What is your business address?

A. It's 575 South 10th Street now, I believe, Lincoln, Nebraska.

Q. And by whom are you employed?

A. The City of Lincoln for the police department.

Q. And in what capacity are you employed there?

A. I'm a detective sergeant assigned to the narcotics unit.

Q. How long have you been a law enforcement officer?

A. Twenty-six years.

Q. And how long have you worked with the narcotics division?

A. Approximately 18 years.

Q. What are your general duties there?

A. I'm a supervisor of - responsible for the supervision of the plain clothes investigators assigned to the unit which would cover the assignment of cases, assisting those officers in working those cases. I also handle personnel matters that relate to those officers. In addition to that, I conduct investigations and carry a caseload of my own.

Q. Do you review other reports prepared by other

officers?

A. Yes, I do.

Q. So you work historical cases on occasion?

A. That's almost all I do, yes.

Q. And were you aware of an investigation concerning John Fellers?

A. Yes, ma'am.

Q. Is John Fellers present in the courtroom today?

A. Yes, he is.

Q. Could you identify him for the Court, please.

A. Yes. He's seated at defense counsel table. He's got on light colored blue jeans and a plaid, tan colored shirt.

MS. LIPOVSKY: I'd ask the record to reflect the witness has identified the defendant.

THE COURT: Yes, it will.

MS. LIPOVSKY: Thank you.

Q. (By Ms. Lipovsky) Detective Garnett, did you have contact with John Fellers on February 24th of the year 2000?

A. Yes, I did.

Q. Where did that contact take place?

A. At his residence in Lincoln, Nebraska.

Q. And is that at 806 Westward Road?

A. Yes.

Q. Who was with you at that time?

A. Deputy Jeff Bliemeister.

Q. Is he also a member of the narcotics task force?

A. Yes, he is.

Q. When you went to the residence on that occasion, were you in uniform or plain clothes?

A. Plain clothes.

Q. Did you and Deputy Bliemeister knock on the door?

A. Yes, we did.

Q. And who answered the door?

A. Mr. Fellers.

Q. Did you and the deputy identify yourself as law enforcement officers?

A. Yes, we did.

Q. How did you do that?

A. I don't recall exactly what Deputy Bliemeister said. I identified myself as Detective Garnett and there was - Deputy Bliemeister had contacted Mr. Fellers on a previous contact and identified himself or said something about, I'm Deputy Bliemeister, do you remember me from before or something, words similar to that effect.

Q. What was Mr. Fellers' reaction?

A. He indicated that he recognized and remembered Deputy Bliemeister.

Q. Did he indicate if he remembered you?

A. Yes, he did.

Q. Had you had previous contact with him?

A. Yes, I had.

Q. And did you recognize Mr. Fellers when you saw him?

A. Yes, I did.

Q. After Mr. Fellers answered the door, what happened?

A. He invited us into the residence. We stepped inside. And at that time Deputy Bliemeister told Mr. Fellers that there were some things that we needed to talk about and went on to explain to Mr. Fellers that an indictment charging Mr. Fellers with conspiracy to deliver methamphetamine had been returned by the Grand Jury. At that time, Deputy Bliemeister also listed off the names of some people - other people who were also involved in that indictment.

Q. At that time, were all of you standing?

A. I believe at that time we were still all standing, yes. There was a --

Q. Did that --

A. I'm sorry.

Q. Did that change?

A. Yes, it did.

Q. How did it change?

A. After we -- as we stepped into the entryway into the residence, then that leads right into the living room. At some point in time, Mr. Fellers had a seat on a either a couch or a loveseat that was in the residence.

Q. Was he directed to sit down?

A. No, he was not.

Q. When he sat down, what did he say to you or Deputy Bliemeister about whether you could be seated?

A. I don't - I don't remember that there was any conversation about whether we could have a seat or not. I don't recall if there was or not.

Q. Where did you position yourself in relation to Mr. Fellers?

A. In the - in the close proximity. We were in the living room. Or I guess I would refer to it as a living room, just a few feet away from this couch or loveseat that he was seated on.

Q. Was this position one that you picked for a specific reason?

A. No.

Q. Was it within arm's length distance of Mr. Fellers?

A. No, it was not.

Q. Nearer or farther?

A. It was further away than that.

Q. Okay. During the contact with Mr. Fellers in the living room, did you and Deputy Bliemeister stay in the same positions?

A. Yes, I believe we did. I don't think anybody moved around at all.

Q. Was your position one of - in an attempt to intimidate Mr. Fellers?

A. No, it was not.

Q. After Deputy Bliemeister had listed the individuals that it was reported Mr. Fellers had been involved with, what was Mr. Fellers' response?

A. Mr. Fellers indicated to us that there had been a point in time in his life where there had been some personal problems, problems that involved an ex-wife, problems that involved the business that he owned and during that time Mr. Fellers indicated that he had used methamphetamine during that time.

Q. Did you ask any questions directly of Mr. Fellers during the time you were in the living room?

A. This conversation regarding the personal problems lasted for several minutes and I recall, at least at one point when he was talking about the

business, I believe I asked him who his business partner was or something to do with the problems associated with the business.

Q. Did that have anything to do with narcotics trafficking?

A. No, it did not.

Q. And did you ask any questions of Mr. Fellers during this time in the living room that was specifically designed to elicit an incriminating response?

A. No, I did not.

Q. Did you interrogate him regarding the individuals that had been mentioned in narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any other questions?

A. When we were preparing to leave and when we had explained to Mr. Fellers that we needed to leave, there was some conversation regarding he needed to get some shoes.

Q. Between the time that you entered and that conversation, were there other questions you were asking Mr. Fellers?

A. I don't remember any other questions, no.

Q. Was there any information he provided during that time period other than his response about having

used methamphetamine that was in relation to the individuals that had been identified for narcotics trafficking?

A. No, there were not.

Q. Mr. Fellers had indicated -- well, at some point, Mr. Fellers was advised that the conversation really needed to wrap up; is that a fair assessment?

A. Yes.

Q. And then also at that point there were some steps taken to get him ready to physically leave the room, for example, getting some shoes; is that right?

A. Yes, ma'am, that's correct.

Q. Okay. During the - the time that he was getting his shoes, who accompanied him to do that, do you remember?

A. Both Deputy Bliemeister and I were with Mr. Fellers.

Q. During that time period, did you interrogate about Mr. Fellers about narcotics or drugs?

A. No, ma'am.

Q. Did he make any statements regarding narcotics or drugs during that time period that you recall?

A. Not during that time period.

Q. He was then transported to the jail; is that correct?

A. Yes, ma'am.

Q. And who transported him?

A. Deputy Bliemeister and I.

Q. During that period of transportation, did you ask Mr. Fellers any questions regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any questions regarding the individuals that earlier had been identified?

A. No, we did not.

Q. During that time period, did Mr. Fellers make any statements regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did -- during that time period, did Mr. Fellers continue to - to make comments about unrelated things?

A. I don't recall if on the ride from the residence down to the jail if that kind of conversation continued or not. I -- that kind of conversation was going on the entire time we were at the house, but I don't remember specifically when we were in the car if it was or not.

Q. When you got to the jail, what area of the jail did you and Deputy Bliemeister take Mr. Fellers?

A. We initially went to the - to the book-in area.

Q. And after that, was there an interview performed of Mr. Fellers?

A. Yes, ma'am, there was.

Q. Where did that take place?

A. In an interview room located off of the book-in area.

Q. Who was present for that interview?

A. Myself and Deputy Bliemeister.

Q. And during the interview, did anyone else enter or leave?

A. No, they did not.

Q. Was Mr. Fellers advised of his Miranda rights?

A. Yes, he was.

Q. Were you present during that?

A. Yes, I was.

Q. Was there a Miranda warning form that was used?

A. Yes, ma'am.

Q. And did you sign that form?

A. Yes, I did.

Q. In front of you is Exhibit Number 1. Do you see that?

A. Yes, I do.

Q. Have you seen that before?
A. Yes, ma'am.
Q. Is that the Miranda form that was used for Mr. Fellers?
A. Yes, it is.
Q. Where does your signature appear?
A. On the lower left towards the bottom under the witness signature line.
Q. During the time that you talked to Mr. Fellers did he ever request to have an attorney present?
A. No, he did not.
Q. Did he ever refuse to make statements to you?
A. No.
Q. Did you ever promise anything to Mr. Fellers in return for him making a statement to you?
A. No, I didn't.
Q. Did you make any promises, direct or implied, to Mr. Fellers that a confession or admission would result in a benefit or advantage to him?
A. No, I did not.
Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?
A. No, ma'am.
Q. And during the interview of Mr. Fellers, was

he asked questions by yourself and Deputy Bliemeister?
A. Yes, he was.
Q. Did he appear to understand those questions?
A. Yes, he did.
Q. Did he provide some answers to some of those questions?
A. Yes, ma'am.
Q. Did they seem to be consistent with the questions that were asked?
A. Yes.
Q. Did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?
A. Yes, he did.
Q. And did Mr. Fellers appear to freely and voluntarily waive his right to have an attorney present during questioning?
A. Yes.
Q. During the interview that took place in the jail, do you recall any questions that you asked him?
A. Yes, I do.
Q. What did you ask him?
A. I asked Mr. Fellers some questions about his use of methamphetamine, questions that related to what method he was using to ingest methamphetamine and

approximate amounts of how much methamphetamine he was using at the time.

Q. And did he provide you with answers to that?

A. Yes, ma'am, he did.

Q. Did -- let me go back to the house for a minute. When you were in the living room and Mr. Fellers was seated, did he have anything to eat or drink?

A. He had a glass or a sports cup of iced tea, I believe.

Q. You said it was iced tea. Do you know there was iced tea?

A. I thought there was some conversation about that at the house. I can't be certain that that's what it was.

Q. During the time that you had contact with Mr. Fellers on that day, did he ever appear to be intoxicated?

A. No, he did not.

Q. Did you ever make any observations regarding what you thought was the use of alcohol?

A. No.

Q. Did you ever smell alcohol on him?

A. No, I did not.

Q. And you said that you had asked Mr. Fellers some questions about his use of methamphetamine and how

he used it. Is that something that you would do on a normal interview of this type?

A. Yes, it is.

Q. During the interview with Mr. Fellers, did he provide information regarding Kathi Kuenning?

A. Yes.

Q. Did he provide information regarding drug use or trafficking with some other individuals?

A. All those matters were discussed, yes.

Q. Did he also make some other statements regarding personal problems again?

A. Yes, he did.

Q. At any time during your contact that day with Mr. Fellers, did he ever refuse to answer questions without an attorney present?

A. No, he did not.

Q. Did he ever invoke his right to silence?

A. No, he did not.

Q. Was he ever -- did he ever request an attorney and have it denied?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. Detective Garnett, did you generate any investigation reports as a result of your contact with Mr. Fellers?

A. No, sir, I did not.

Q. Did you know Mr. Fellers prior to contacting him on February 24, 2000?

A. Yes, sir, I did.

Q. From a previous personal contact?

A. Yes, sir.

Q. At his home?

A. No, sir.

Q. Where did that previous personal contact occur?

A. Well, it was a business contact, if you will. I mean, I believe it occurred at the -- it was in 1991, I believe, that it occurred at the Harvester Motel, I think.

Q. You weren't on duty or working at the time of that contact?

A. Yes, I was. That's what I mean. It was a per -- it was a business contact.

Q. Oh, okay. So it had to do with police business.

A. Yes, sir.

Q. Is that the only previous contact you'd had with him?

A. Yes, sir, I believe it is.

Q. Was he working at that Harvester at that time?

A. No, sir.

Q. When you contacted him on February 24th, did you have a tape recorder?

A. No, I did not.

Q. Was there one in the vehicle?

A. Not to my knowledge.

Q. Whose vehicle was it?

A. Deputy Bliemeister's.

Q. When you contacted him, the purpose of the contact was to arrest him on the federal warrant?

A. Yes, sir.

Q. And you had that warrant with you at the time?

A. Yes, sir, I did.

Q. And when you knocked on the door and he answered, the first one to speak was Mr. - was Deputy Bliemeister?

A. Yes, sir.

Q. And Deputy Bliemeister, his initial comment was that you were there to discuss with Mr. Fellers his involvement in the use and distribution of

methamphetamine?

A. Words to that effect and - and I don't know the first words he said was, do you remember me or - but those two statements were made almost simultaneously.

Q. Okay. And then Mr. Fellers was told that you had a warrant for his arrest?

A. Mr. -- as we stepped inside, Mr. Fellers was told that the Grand Jury had returned an indictment against him. I don't specifically ever remember at that point whether or not a further explanation was afforded that there was an actual warrant for his arrest or not.

Q. But that you told him - or Bliemeister told him that you were there to arrest him.

A. Yeah. Again, I remember specifically the conversation about the indictment charging him with methamphetamine, and I -- again, I don't know if the words were ever uttered, I'm here to put you under arrest. I can't tell you that they were, sir, no.

Q. You can't say whether they were or whether they weren't.

A. No, I can't.

Q. But you do remember the comment about the indictment being made by Deputy Bliemeister?

A. Yes, sir.

Q. And that indictment comment was made in

connection with certain names by Deputy Bliemeister.

A. That's correct.

Q. Do you remember the names that Deputy Bliemeister said to Mr. Fellers?

A. Some of them, if not all of them.

Q. Tell us the ones that you can remember.

A. Kathi Kuenning, Thomas Geffs, Patrick Sardeson.

Q. Do you remember him saying anything about Mark Farfalla?

A. I don't remember that, but it - Mr. Farfalla was part of that investigation so it's possible that name was mentioned as well.

Q. Do you remember him saying anything about Ernest Lawrence or Leon Thompson?

A. We talked about Ernest Lawrence at the jail, but I don't - I don't remember that name being mentioned at the initial contact.

Q. What about Leon Thompson?

A. I don't remember that name, either, being mentioned.

Q. At the time of the contact with Mr. Fellers he was not free to go, was he?

A. No, sir.

Q. And at the time of the contact with Mr.

Fellers, he was not advised of his right to remain silent, was he?

A. No, sir, he was not.

Q. And he was not advised of his right to have the assistance of an attorney during any conversation with him, was he?

A. No, sir.

Q. You, as a police officer for how many? Twenty-six years?

A. Yes, sir.

Q. -- have received training in how to conduct an arrest?

A. Yes, sir, I have.

Q. And the training is that when an arrest is made, the arrestee is advised of his right to remain silent and to have an attorney present.

A. No, sir.

Q. That's not your training?

A. Not when we're talking about merely arresting someone, no, sir.

Q. Okay. Are you trained to preface the arrest with the comment that you're here to discuss involvement in the use or distribution of methamphetamine in this type of a case?

A. No, sir, not necessarily.

Q. When you were talking with Mr. Fellers in his residence, he sat down and offered you a seat to discuss whatever you wanted to discuss.

A. I -- again, I don't remember that he offered us a seat, but he may - may well have, yes.

Q. And he did take a seat himself and made the statement that he would talk to you about what you wanted to talk about.

A. Yes, sir, there was conversation about that.

Q. And he was, again, told that you were there to discuss his involvement in the use and distribution of methamphetamine.

A. He was - he was told by Deputy Bliemeister that we need to talk to you about this use and the sale of methamphetamine, yes.

Q. And while you were talking to him, you and Deputy Bliemeister were standing a few feet away from him.

A. That's correct.

Q. Were you side by side?

A. We weren't standing exactly side by side, but I'm sure we were in close proximity to one another, yes.

Q. Facing Mr. Fellers.

A. Yes.

Q. And during that conversation, he made

statements to you and Deputy Bliemeister in connection with the names of the people that Deputy Bliemeister said to him when he talked about the federal indictment.

A. No, sir. Deputy Bliemeister said those names at the same time he was explaining about the indictment. That's who brought those names up.

Q. Deputy Bliemeister.

A. Yes.

Q. And Mr. Fellers, in response to that statement by Deputy Bliemeister, talked about using methamphetamine.

A. Yes.

Q. During a period of time in his life when he was associating with those people.

A. He didn't connect the use of the methamphetamine specifically with any one of those people at that time.

Q. He was talking about them generally.

A. He was talking about his use of methamphetamine.

Q. During a particular time in his life.

A. Yes, sir, that's correct.

Q. And it was in connection with personal problems that he had.

A. That's correct, yes, sir.

Q. And then you think that conversation lasted several minutes?

A. I don't -- I didn't pay any attention to when it started and when it ended, but we weren't there a great deal of time, no, sir.

Q. Approximately 15 minutes?

A. I would think that that's somewhere in the ballpark, yes, sir.

Q. Do you remember what time you arrived at the jail?

A. Not speci -- excuse me, not specifically, no, sir.

Q. How about approximately?

A. It had to be, I'm thinking, between 4:30 and 5 p.m.

Q. In -- at the jail did you have a tape recorder?

A. No, sir, we did not.

Q. Did you attempt to get one?

A. No, sir.

Q. In the interview at the jail, could you estimate approximately how long that interview lasted?

A. Oh, to be honest with you, I'd just be guessing if I said.

Q. That's okay with me.

A. I'm going - I'm going to say 30 minutes maybe. Maybe a little bit more, maybe a little bit less. I --

Q. Approximately 30 minutes?

A. I'm going to think somewhere in that area, yes.

Q. And during that interview, Mr. Fellers again made statements to you about the use of methamphetamine at a particular point in time in his life.

A. Yes, sir, he did.

Q. While he was experiencing personal problems.

A. Yes.

Q. And during the interview at the jail, the same names that Deputy Bliemeister mentioned at the home were mentioned by either you or Deputy Bliemeister.

A. Yes, sir. At the jail, he was interviewed about - specifically about those people and his relationship and involvement with those people, yes.

Q. Okay. And his statements to you about those people was also in connection with that time in his life when he was using methamphetamine.

MR. LIPOVSKY: I'm going to object. That's asked and answered.

THE COURT: (Indiscernible)

A. I'm sorry. Would you state that again, please, sir.

Q. (By Mr. Brennan) The statements that he made at the jail in connection with those people whose names were mentioned --

A. Um-hmm.

Q. -- was also about the personal problems that he was having while he was using methamphetamine.

A. Again, he was relating the use of the methamphetamine to the personal problems. We interviewed him - or attempted to interview him in depth about those particular individuals. If you're asking me was this over the same time period, I would say that yes, it was, at least in part of it.

Q. Okay. After the interview was over, did you tell Mr. Fellers that you would see what you could do to help him?

A. We had a discussion as the interview was ending, and - or as the interview was over, when we ended the interview. We talked about a number of things, and I believe one of the things that we talked about after the interview was over was that we thought Mr. Fellers had information that would be of use to us that had not been provided by Mr. Fellers.

Q. That was a statement you made to him?

A. I'm sure I did, yes.

Q. And that you wanted to work with him or do

something to help him?

A. No, sir. That statement - that part, that statement was not made because the interview -- Mr. Fellers was told as the interview was over that we felt he was withholding information, that he had not been truthful with us and that we had information very contrary to what he was telling us.

Q. Was he searched by either you or Deputy Bliemeister?

A. At what time, sir?

Q. Either at the residence or at the jail.

A. He was -- he would have been searched by us prior to leaving the residence and being transported to the jail. And he would have been searched once again by the jail staff personnel, yes.

Q. When you searched him at the residence, did you seize any evidence from him?

A. No sir.

Q. Do you know whether the jail seized any evidence from him?

A. Not to my knowledge.

MR. BRENNAN: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. At some point after the interview did someone mention the possibility of a proffer interview to Mr. Fellers?

A. Yes, we did.

Q. Was that brought up before or after the interview?

A. That would have been brought up at the end of the interview.

Q. Was he continued to be interviewed after that?

A. No.

Q. Do you remember the conversation at the home when Mr. Fellers responded about that was when I was having personal problems - using meth and I was having personal problems, did Mr. Fellers ever identify specifically people that he had obtained methamphetamine from?

A. No, he did not.

Q. During that - his statements at his home, did he ever identify who he had sold methamphetamine to?

A. No, ma'am.

Q. Did he ever make any statements as to who was involved in his use of methamphetamine while he was at the home?

A. No.

Q. While he was at the home and you were - he was

making comments at the home, did he ever specify any information regarding the people whose names had been identified by Deputy Bliemeister?

A. No, he did not.

Q. And while he was at the home, was he specifically asked questions about those individuals?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: You may step down.

MS. LIPOVSKY: Your Honor, may this witness be excused?

MR. BRENNAN: No objection.

THE COURT: All right. Yes, you're excused.

MS. LIPOVSKY: I have no other witnesses.

THE COURT: Evidence for the defense?

MR. BRENNAN: I do not intend to present evidence.

THE COURT: All right. I'll hear your arguments. First, Mr. Brennan.

MR. BRENNAN: It's clear from the evidence that Mr. Fellers was contacted for the purpose of being arrested, contacted by two law enforcement officers. And the first thing that they said to him was, we're here to discuss your involvement in the use and distribution of

methamphetamine. In fact, on a previous occasion, Deputy Bliemeister had been there on a - what he couched as a knock-and-talk contact. He said the same thing that time: I'm here to discuss your use and involvement - or your involvement in the use and distribution of methamphetamine - or in activity involving methamphetamine.

It's clear that that was the purpose on the previous occasion to get Mr. Fellers to make statements and the purpose of making those comments on February 24, 2000. There really isn't any other reason to say that. They're not trained to say that, that Deputy Bliemeister's practice is to say that when he is arresting someone who has been indicted by a federal grand jury. Both officers testified that they told Mr. Fellers - or that Deputy Bliemeister told Mr. Fellers that he had been indicted by a federal grand jury. Sergeant Garnett wasn't able to specifically recall the names but Deputy Bliemeister seemed to be able to do that. And he said that the names that he told Mr. Fellers that he wanted to discuss with him were Patrick Sardeson, Thomas Geffs, Kathi Kuenning and Mark Farfalla. And he said that in the same breath as the comment that he made about why he was there. We're here to discuss your involvement in the use and distribution of

methamphetamine. We have a federal warrant for your arrest and you've been indicted by a federal grand jury in connection with these people and their activity concerning methamphetamine. If that is not a statement that is designed to elicit a response, then I don't know what one is.

Now, Deputy Bliemeister said that wasn't the reason that he made that statement, but it's clear that any reasonable person would recognize that that statement would probably, most likely, elicit a response from the person that the statement is being made to. And that's what it did. Mr. Fellers sat down on the couch and offered seats to these officers to discuss whatever it was they wanted to talk to him about. And then he began talking about his use of methamphetamine in connection with the statement made to him concerning the people named, Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs. He may not have repeated their names to those deputies - or to the deputy and the sergeant when he was talking to them about his use of methamphetamine, but it's clear in the entire context of the conversation that that's what he was referring to. They gave him names. He refers to a time in his life in responding to those names about when he's having personal problems with his marriage and his business and that

that's when he was using methamphetamine.

At that point, he has already acknowledged to these law enforcement officers that he knows what they're talking about, he knows who these people are and he knows that it's in connection with their use of methamphetamine and their providing it to him for his own use. And to then later on take him to the jail and advise him of his right to remain silent and have an attorney present and then go through within more detail doesn't cure the fact that they have elicited incriminating statements from him at a time when he's not free to go. He's clearly in custody; no one can make a credible argument that he was not in custody at the time that he was being interviewed at the home while he was sitting and they were standing over him.

Then later take him to jail and say okay, now we're going to advise you of your rights. We're going to go through this in greater detail does not cure the illegality of the information obtained. And the -- the case I cited to you in my brief -- I think it's Brown v. Illinois -- says that the mere giving of Miranda warnings and a (indiscernible) waiver obtained thereby doesn't insulate a subsequent interrogation from the exclusionary rule where the information obtained during that subsequent interrogation was merely expanding on or

elaborating on the information that was obtained illegally. And it's clear that he was in custody and unadvised and therefore his statements made at the house shouldn't be admissible. And the mere giving of Miranda warnings at the jail doesn't cure the admissibility or the effect on the admissibility of those statements later on at the jail simply because they involve more detail and may involve a couple of more names.

So we would respectfully submit to this Court that whether Deputy Bliemeister admits it or not, it was clear that - it was clearly unnecessary to tell him in a preface to the fact that they were going to arrest him, that they were also there to discuss this with him and that it's clear that the effect of that was to induce him to make incriminating statements. The law doesn't permit you to obtain incriminating statements from someone without advising them of their rights while they're in custody and then later on advising them of their rights and go through it again even if it happens to be in a little bit more detail.

And so for those reasons, we would respectfully submit that the jailhouse interview is equally inadmissible and I don't think there can be any credible argument that the statements made at the - at the home were not made in custody and in response to

questions or a statement designed to elicit a response. And we would ask the Court to sustain the motion to suppress the statements and not permit them to be used at the trial in this case.

THE COURT: Miss Lipovsky?

MS. LIPOVSKY: Thank you, Your Honor.

First off, I don't believe either witness testified that Mr. Fellers was told we have a federal warrant for your arrest. I don't remember either witness --

THE COURT: Bliemeister did.

MS. LIPOVSKY: Bliemeister did? That he said that he had a federal warrant that he told Mr. Fellers that? I believe it was --

THE COURT: In response to my question, he said that.

MS. LIPOVSKY: My recollection of it was that Deputy Bliemeister said they had a federal warrant, but I don't recall the specific words used by him. My understanding and my impression of what he said is that we had - they had a federal warrant for his arrest, not that he was told. Deputy Bliemeister testified several times what he said, and he said that, we're here - we need to talk about your involvement with methamphetamine. You've been indicted by the Grand Jury regarding your

association with Kathi Kuenning, a couple of other people, Patrick Sardeson, Thomas Geffs, and I believe Mark Farfalla.

With the understanding -- that's my recollection. But the testimony is I think that there is a question as to whether or not a reasonable person would have believed that they were in custody at that point in time. Later Mr. Fellers was arrested but originally, my understanding of the testimony and Deputy Bliemeister's statement was that, they didn't tell him they had the arrest warrant, they didn't tell him he was arrested at that time. But they did tell him that he - that an indictment had been returned.

And of course, that puts it in a little position than most of the cases that talk about an individual that yes, they're going to arrest him, but they don't tell him at the time that they go to talk to him. So the question is if a reasonable person would have believed they were in custody at the time, independent of what the officers believed, they would have allowed him to leave, to come and go or not. And so I think that there is an argument that at the time they made the initial contact he was not custody.

But, even if the Court wants to find that he was in custody because there was a warrant that was in

existence for Mr. Fellers and he had been told that he had already been indicted, in order to trigger Miranda, you have to interrogate Mr. -- you have to interrogate the person.

It is the Government's position that in this particular case the officers were not interrogating Mr. Fellers. They advised him that they would like to talk to him - or that they needed to talk to him about methamphetamine, that there was an indictment and it was regarding these individuals. And after this - making the comment that the indictment's been returned about your trafficking activities or your narcotics activities with Geffs, Kuenning, Sardeson and Farfalla, Mr. Fellers says, oh, you know, that period of time was, you know, I mean, I was using methamphetamine and had all these problems. And he starts talking about all of his personal problems. He's not questioned after that. He isn't asked, well, what were you doing with Kathi Kuenning, what was going on specifically with Pat Sardeson. Mr. Fellers, who's sitting casually in his home, talking, drinking from a mug of iced tea, is talking about his personal problems. And he's not even responding or giving any information that's in relation to drug narcotic trafficking. The only thing he said was that he had used methamphetamine during a period of time when he was having personal

problems. And they he continued to expound upon those personal problems.

The officers let him talk for five to ten minutes and finally said, okay, that's it, we've got to move on, we're going to arrest you, we need to take you down to the station. And that's when the search for the shoes and the other things happened.

After they got to the station, the officers and Mr. Fellers went into the other room. Mr. Fellers had indicated he was willing to talk. They Mirandized him. He willingly waived all of his Miranda rights and then they began to ask him specific questions and he began to give them information.

In Alstad v. Oregon, which is at 105 Supreme Court 1285, is a post Brown case. It's in 1985. And in that case, the Court is very clear. It says that when a suspect who has once responded to unwarranted and uncoercive questioning, he is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. And that's what you have here. There was no interrogation of Mr. Fellers at his home. The only halfway incriminating statement he made was that he had used methamphetamine during a period of time when he was having personal problems. That was not coercive questioning. In fact, in the Government's

position, it wasn't questioning at all. It was merely a response Mr. Fellers had to the statement that he'd been indicted regarding his activities with these people.

Once he was taken into the station, the officers read him his rights. That's recorded in Exhibit 1. He willingly, knowingly, intelligently and voluntarily waived all of those rights. And all the statements he made after that are admissible in this court. (Coughing) Excuse me. That is when he made statements regarding those individuals, statements that he had never made before. He provided information that he had never provided before. He went into details that he'd never provided before. What he said at the station was not a repeat of what he had said in his home. As I said before, and as the officers testified to several time, he didn't say anything that was incriminating about methamphetamine or those individuals other than a simple statement, oh, that's when I was using methamphetamine. I had a lot of problems then, and he starts talking about all of his problems.

So it's the Government's position that all of the statements that Mr. Fellers made are admissible, and in particular the statements that were made after he waived his Miranda rights and was actually in custody and interrogated by the officers. All of those statements

are admissible and the defendant's motion should be denied.

THE COURT: Mr. Brennan, anything else?

MR. BRENNAN: Just briefly, Your Honor. It is my recollection, and I think it's clear, that Deputy Bliemeister did tell and testified before this Court that he told Mr. Fellers that they were there to arrest him and had a federal warrant for his arrest. His testimony was he made the comment about what they were there to discuss, that he then made the comment that there was a federal arrest warrant and that they were there to arrest him and then he made the comment about the indictment and naming the people whose names were brought up in connection with the indictment.

If that's not a clear signal to Mr. Fellers that he is under arrest and not free to go, I don't know what is. There should really be no question about whether he was in custody at the time of the interview in the living room of his home. And unfortunately, we don't have a tape recording of that interview, nor do we have a tape recording of the interview at the jail. That's not Mr. Fellers' fault, but it just seems a little unreasonable to assume that that interview at the home was, with two officers standing there saying nothing, and Mr. Fellers just rambling on for 15 minutes about the

personal problems in his life when he was associating with these people while he was using methamphetamine. It is not a reasonable argument to say that they just stood there and listened and didn't say anything to him during that conversation.

It's clear that the initial comment was if not designed to elicit a response, which I think it was, was clearly one that any reasonable person would respond to if the statement was made, and it's clear that it wasn't him just volunteering information but, rather, responding to what was said to him by the arresting officers.

And then later at the jail again, we don't have the benefit of a tape recording, but the law recognizes the psychological effect that it has on a suspect in custody when he's already given information and then later being asked, do you want to now assert your right to remain silent and have an attorney and the futility that everyone would recognize in now making that assertion after the cat's already out of the bag and the person has already given the incriminating information. And that's precisely why the law is - the exclusionary rule does not permit those subsequent statements to be admitted in court if they're merely following up on previously illegally obtained admissions. And with those comments, we would again ask the Court to sustain the

motion.

THE COURT: Well, the principal issues before the Court in regard to the motion to suppress are, first of all, whether or not the defendant was in custody at the time of the statements made in his home at the time of his visit by Detective Garnett and Deputy Bliemeister.

The factors that I have to consider in determining whether or not the defendant was in custody at that time are stated in United States v. Griffin, 922 F 2nd 1343, which is an Eighth Circuit case in 1990. The first one is whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject - suspect was free to leave or request the officers to do so or that the suspect was not considered under arrest. Obviously, that's not applicable here.

Second, whether the suspect possessed unrestrained freedom of movement during questioning and Deputy Bliemeister said that he was not free to move around. And that was confirmed by Detective Garnett.

Whether the suspected -- excuse me, whether the suspect initiated contact with authorities. He did not. Or voluntarily acquiesced to official requests to respond to questions. The request was an official request to talk. It wasn't to respond to questions explicitly. But implicitly, it was.

Whether strong arm tactics or deceptive stratagems were employed during the questioning, I do not see that there was any strong arm tactic involved at all; however, the use of detective stratagems is another matter. There were no deceptions as such, but when the officers arrived, Detective Bliemeister said that the purpose of their visit was to discuss with the defendant his role in methamphetamine use and distribution. That was not a true statement. Their purpose was to arrest him. In addition, Detective Garnett stated we need to talk with you about your involvement in methamphetamine use or distribution. Again, while that's not altogether untrue, it does not reflect truthfully the purpose of their visit.

The next factor is whether the atmosphere of the questioning was police dominated, and I find that it was police dominated. They had, at that time, arrested him. I find specifically that Deputy Bliemeister did advise him that either he was arrested or they had a warrant for his arrest in the course of his initial contact and comment to the defendant.

The last factor is whether the suspect was placed under arrest at the termination of the questioning. Obviously, he was arrested before that.

One other thing: With regard to the arrest,

there was a notable lack of testimony that at the conclusion of their conversation the officers arrested the defendant. Both of them testified that the comment that was made was simply we need to go now, John, and take you to the jail. If they had not previously advised him that he was under arrest or if it were not clear that he was under arrest, then they would have had to have explained that statement and to explicitly arrest him at that time. There was no testimony that they did.

I therefore find that he was under arrest at the time of all of the statements made. He was definitely in custody under the considerations of Griffin.

The next question is whether or not he was interrogated. The applicable test is from Rhode Island v. Innis (ph). And, as stated by Mr. Brennan, it is whether or not the comment made was designed to elicit a response. I find that it was. First of all, it is telling, I think, that the first statement made was, we need to talk with you - or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a

response.

In addition, it was, again, as Mr. Brennan mentioned, unnecessary for him to say what the indictment was all about specifically mentioning individuals which incident - who incidently are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

The next question is since he was not Mirandized and since he was interrogated while he was in custody, how much needs to be suppressed. The defendant states that everything involved in the - in the comments made by the defendant should be suppressed, even those subjects which were repeated at the jail. I must decide whether or not the subjects that were first broached at the home and later discussed in detail at the jail -- I guess the issue is whether or not there was something in between to attenuate the primary taint, as the clause goes. There was no evidence in that regard, directly. There was evidence that they took him immediately to the jail; he was booked in. I think I can take judicial notice of the fact that wherever this address is in Lincoln, Nebraska, it's probably no more than 20 minutes away from the jail. So I think that it's fair to

conclude that this conversation took place approximately a half hour after the officers and the defendant left his home.

He was Mirandized at this time and I also find that he voluntarily agreed to talk with the officers at that time.

Obviously, the subjects that were mentioned for the first time at the jail and the defendant's comments regarding those subjects need not be suppressed. My notes indicate that the individuals Ernie Lawrence, Valerie Green, Leon Thompson, Shelly Farfalla were first mentioned at the jail. Also the subject of the defendant's involvement in distribution of methamphetamine was first mentioned at the jail. And also the subject of the defendant fronting money for the purchase of methamphetamine was mentioned first at the jail.

With respect to the individuals that were mentioned and the fact that by answering, the defendant acknowledged that he knew those individuals and by stating that at that period of time, he was having personal problems and was using meth, thereby incriminating him and connecting the meth with the individuals, that must be suppressed. And I shall recommend that all of the comments made by the defendant

at the home be suppressed as well as any comments regarding those specific individuals elicited at the time of the interview in the jail be suppressed. That would be the three individuals: Kathi Kuenning, Pat Sardeson and Thomas Geffs, otherwise known as Slick.

There's no information by which I can find that the primary taint of the initial interrogation by the officers was removed by any time or any other activity between the time of the initial statement - interrogation and statement and the time of the subsequent interview in the jail.

Therefore, it will be recommended - is recommended to the trial judge pursuant to 28 USC 636b(1)(b) that the motion to suppress be granted in these respects and denied in all other respects. I shall order that at the time the transcript of this hearing is filed that will be deemed the filing of the report and recommendation. I will direct the clerk to notify counsel of that filing and at that time we'll commence the ten-day limitation for filing objections. Either side or both sides may file objections. After they have been responded to, the matter will go before the trial judge for a decision.

Is there anything else that we should address regarding this case today?

MS. LIPOVSKY: Is this -- no.

THE COURT: All right.

MR. BRENNAN: I'm sorry. Did you mention the name Mark Farfalla in - you said three names, and there were actually four names that were mentioned by Bliemeister at the home and the fourth name was Mark Farfalla.

THE COURT: Let me check my notes on that. I did not write that - that name down as I was taking notes. If, in the transcript, that name is mentioned as having been mentioned at the home for the first time, then my recommendation would include that name as one of the subjects to be suppressed. All right.

If there's nothing else, we'll be in recess.

MR. BRENNAN: Thank you.

(end of proceedings)

* * * * * *

TRANSCRIBER'S CERTIFICATE

I hereby certify that the previous pages reflect truly, accurately and completely the recording of this proceeding as transcribed by me to the best of my ability.

In testimony whereof, I have hereunto set my hand this 29th day of April, 2000.

Karen Mason

Transcriber - Karen Mason

APPENDIX "F"

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(2)

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-6320

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 285 F.3d 721.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2002. A petition for rehearing was denied on May 7, 2002. Pet.

---

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the opinion of the court of appeals as Pet. App. A1-A4, the court of appeals' denial of the petition for rehearing as Pet. App. B1, and the district court's order on the motion to suppress as Pet. App. C1-C7.

App. B1. The petition for a writ of certiorari was filed on July 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months' imprisonment, to be followed by a four-year term of supervised release. Gov't C.A. Br. 5-6. The court of appeals affirmed. Pet. App. A1-A4.

1. On February 23, 2000, a federal grand jury returned a one-count indictment charging petitioner with conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 846. Gov't C.A. Br. 1. Two police officers went to petitioner's home the next day to arrest him on that charge. Pet. App. A2. When the police arrived at petitioner's home, an officer told him that they were there to discuss petitioner's involvement in the distribution of methamphetamine, that a grand jury had indicted petitioner for conspiring to distribute methamphetamine, and that they had a federal arrest warrant. Pet. App. C3; 4/20/2000 Tr. 9, 57. The officer further explained to petitioner that the indictment

concerned petitioner's involvement with persons such as Kathi Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. Pet. App. C3; 4/20/2000 Tr. 9-10, 57. At that point, petitioner began offering information about "personal problems" that he had when he was associated with those persons and using methamphetamine. 4/20/2000 Tr. 10-13, 69; Pet. App. C3. While petitioner mentioned his use of methamphetamine, he did not discuss his alleged involvement in the distribution of methamphetamine, and the officers directed no questions to him. Pet. App. 4/20/2000 Tr. 43, 58; Pet. App. C3. After about fifteen minutes in petitioner's home, the officers transported petitioner to the county jail. Pet. App. C3.

At the jail, the officers advised petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his Miranda rights and he signed a written waiver of rights form. 4/20/2001 Tr. 16-21. He thereafter gave a statement concerning his acquisition, use, and distribution of methamphetamine. Id. at 21-32.

2. Before trial, petitioner moved to suppress both the statement he made at his home and his subsequent statement at the jail. Pet. App. A2. A magistrate judge recommended that the statement petitioner made at his home be suppressed because he had not been advised of his Miranda rights before making that

statement. Pet. App. C2. The magistrate judge further recommended that portions of petitioner's subsequent jailhouse statement that involved the individuals identified by the officers at petitioner's home should also be suppressed as the fruit of the prior failure to provide Miranda warnings. 4/20/2000 Tr. 102-107; see Pet. App. C2.

The district court granted the suppression motion as to the statement that petitioner made at his home in the absence of Miranda warnings. Pet. App. C2, C7. The district court noted that petitioner was in custody at the time of the statement at his home and that the statement was made in response to remarks of the officers which were "implicitly questions." Pet. App. C1, C6.

The district court, however, ruled that petitioner's subsequent statement made at the jail should not be suppressed. The district court reasoned that because petitioner voluntarily made the jailhouse statements following waiver of his Miranda rights, those statements were admissible under Oregon v. Elstad, 470 U.S. 298 (1985). Pet. App. C4-C7.

3. Following a jury trial at which statements from petitioner's jailhouse interview were admitted into evidence, petitioner was convicted of conspiring to distribute methamphetamine in violation of 21 U.S.C. 846. The court of appeals affirmed. Pet. App. A1-A4.

The court of appeals rejected petitioner's argument that the statement made at the jail was tainted by improperly elicited statements made at his home before his waiver of his Miranda rights. Pet. App. A3. The court of appeals found that the jailhouse statements were admissible under the rule of Oregon v. Elstad, which held that "[t]hough Miranda requires that [an] unwarned admission must be suppressed, the admissibility of any subsequent statement should turn * * * solely on whether it is knowingly and voluntarily made." Pet. App. A3 (quoting Elstad, 470 U.S. at 309). The court of appeals found that the record here amply supported the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. Ibid.

The court of appeals also noted petitioner's argument that under Patterson v. Illinois, 487 U.S. 285 (1988), "the officers' failure to administer the Miranda warnings at his home violated his Sixth Amendment right to counsel inasmuch as the encounter constituted a post-indictment interview." Pet. App. A3. The court of appeals found Patterson "inapplicable here," because "the officers did not interrogate [petitioner] at his home." Ibid.

In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers did violate petitioner's Sixth Amendment right to counsel by

deliberately eliciting incriminating information after the indictment had been returned. Pet. App. A4. He stated, however, that the constitutional violation with respect to petitioner's initial statement did not require suppression of petitioner's subsequent jailhouse statement. Under the rationale of Elstad, Judge Riley reasoned, the jailhouse statement was admissible in light of petitioner's knowing and voluntary waiver of his right to counsel during the questioning at the jail. Ibid.

ARGUMENT

Petitioner contends that his jailhouse statement should have been suppressed as the fruit of the statement he had made at his home without the benefit of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). The decision below rejecting that claim does not conflict with any decision of this Court or any court of appeals.[2]

1. It is well-established that, once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in

[2] There is no basis for petitioner's apparent claim (Pet. 23) that his entire jailhouse statement should be suppressed as the fruit of the statement made at his home. Even the magistrate judge, who agreed with petitioner's claim that the second statement was tainted by the initial Miranda violation, recommended suppression of only those parts of petitioner's jailhouse statement that involved specific individuals identified by the officers at petitioner's home. 4/20/2000 Tr. 105-107. Petitioner made no showing that his entire second statement, which broadly covered areas severable from his brief remarks at his home, could possible be viewed as the product of his initial statement.

the prosecution's case-in-chief statements "deliberately elicited" from a defendant without an express waiver of the right to counsel. Massiah v. United States, 377 U.S. 201, 205 (1964). It is equally well-established that the Fifth Amendment requires that Miranda warnings must be given before a suspect's statements made during "custodial interrogation" can be admitted in the prosecution's case-in-chief. Dickerson v. United States, 530 U.S. 428, 431 (2000).

Petitioner argues (Pet. 9-16) that this Court's review is warranted because the court of appeals, in determining whether the officers' conduct at his home violated the Sixth Amendment, improperly considered whether petitioner was "interrogate[d]" by police. Pet. App. 3. Petitioner relies (Pet. 12-13) on this Court's statement in Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980), that [t]he definitions of 'interrogation' under the Fifth and Sixth Amendment, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." Petitioner also relies (Pet. 14) on this Court's statement in United States v. Henry, 447 U.S. 264, 271 (1980), that "affirmative interrogation" is not required for police conduct to constitute deliberate elicitation of incriminating information in violation of the

Sixth Amendment. Petitioner's contention does not warrant this Court's review.

In Innis, the Court held that "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent," and the "functional equivalent" of interrogation in turn consists of "words or actions on the part of police * * * that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). In this case, petitioner was in police custody following his arrest, and thus the relevant question under the Fifth Amendment was, not only whether the police affirmatively questioned petitioner, but also whether the officer should have known that his statements or conduct were likely to elicit an incriminating response. In those circumstances, there is no meaningful distinction between that Fifth Amendment standard and the Sixth Amendment standard that asks whether the officer deliberately intended to elicit incriminating information from petitioner. Indeed, in Patterson v. Illinois - the decision that the court of appeals discussed in rejecting petitioner's claimed violation of the Sixth Amendment right to counsel - the Court addressed a Sixth Amendment violation by referring to the post-

indictment "interrogation" of the defendant in that case. Patterson v. Illinois, 487 U.S. at 285.[3]

Nothing in the court of appeals' decision purports to weaken or alter the standard used to determine whether police engage in conduct that transgresses the Sixth Amendment. The decision below does not suggest that police must engage in explicit questioning of a suspect before a Sixth Amendment violation can be established, and other decisions of the Eighth Circuit have expressly endorsed and applied the "deliberately elicited" standard to Sixth Amendment claims. See, e.g., Manning v. Bowersox, 310 F.3d 571, 575 (8th Cir. 2002) ("the government may not, either directly or through its agents, deliberately elicit incriminating information from suspects without counsel present"); United States v. Red Bird, 287 F.3d 709, 713 (2002)

---

[3] As the Court noted in Innis, 446 U.S. at 300 n.4, the Fifth and Sixth Amendments do impose different obligations on police in their dealings with suspects. The Sixth Amendment, which attaches upon the initiation of formal proceedings against a suspect, applies whether or not the suspect is in custody, ibid, and applies even where the person who elicits the incriminating office is a not police officer. E.g., Henry, supra (government agent who shared cell-block with defendant); Massiah, supra (co-defendant acting as a government agent). In contrast, the Fifth Amendment under Miranda may be implicated only when the police question a suspect who is in custody, and even then, only when the suspect is aware that he is speaking to law enforcement. Illinois v. Perkins, 496 U.S. 292, 297 (1990) ("Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."). But nothing in those cases draws a line between Fifth and Sixth Amendment standards on whether the police interaction with the suspect held in custody constitutes "interrogation" versus "deliberate elicitation."

("Any statement about the charged crime that government agents deliberately elicit from a defendant without counsel present after the defendant has been indicted must be suppressed under the Sixth Amendment exclusionary rule."). All the court did was use the shorthand of "interroga[tion]" to denote that no Sixth Amendment violation occurred - shorthand used in Patterson itself. The court of appeals' fact-based determination in that respect does not warrant further review by this Court.

2. Petitioner also argues (Pet. 17-23) that this Court's review is necessary to determine whether his jailhouse statements, which were preceded by a voluntary waiver of the right to counsel, should nonetheless be suppressed as a fruit of an unlawful Sixth Amendment violation. This case is not an appropriate vehicle in which to address that question. The concurring opinion by Judge Riley expresses the view that, under the Court's reasoning in Elstad, petitioner's jailhouse statements, which were preceded by a waiver of petitioner's right to counsel, were admissible notwithstanding Judge Riley's conclusion that the officer's earlier questioning of petitioner at his home violated his Sixth Amendment right to counsel. Pet. App. A4. The court of appeals, however, did not explicitly address the implications of Elstad for Sixth Amendment claims, and it had no occasion to do so, because it held that the officer's questioning at petitioner's home did not violate the

Sixth Amendment. See Pet. 17 ("[S]ince the Eighth Circuit found no Sixth Amendment Massiah violation, they never determined whether the second statements should have been excluded as fruits of the illegal post-indictment interview.").[4] Moreover, petitioner does not contend that any other court of appeals has addressed the issue. Particularly since the court of appeals did not squarely address the issue, this Court should decline to do so in the first instance.[5]

---

[4] Although the court of appeals did hold that petitioner's jailhouse statements were admissible under Elstad (Pet. App. A3), the court of appeals presumably was rejecting a claim under the Fifth Amendment, since it had found no Sixth Amendment violation.

[5] Contrary to petitioner's suggestion, this Court's decisions have not resolved the issue of whether the ruling in Elstad may apply when a suspect makes incriminating statements after knowingly and voluntarily waiving his right to counsel, notwithstanding earlier police questioning that violated the Sixth Amendment because the defendant at that time had not waived his right to counsel. The only Sixth Amendment decision cited by petitioner, Nix v. Williams, 467 U.S. 431 (1984), did not squarely address the issue, but held that physical evidence that is the product of a Sixth Amendment violation need not be suppressed if the police would have inevitably discovered the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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DECEMBER 2002

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NO. 02-6320

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. FELLER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JOHN J. FELLERS
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6 pp

QUESTIONS PRESENTED

I. Did the Court of Appeals err when they concluded that Petitioner's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), was not violated because Petitioner was not "interrogated" by Government agents; when the proper standard under Supreme Court precedent, is whether the Government agents "deliberately elicited" information from Petitioner?

II. Should the second statements- preceded by Miranda warnings- have been suppressed as fruits of the illegal post-indictment interview without the presence of counsel, under this Court's decisions in Nix v. Williams, 467 U.S. 431 (1984), and Brown v. Illinois, 422 U.S. 590 (1975)?

IN THE SUPREME COURT OF THE UNITED STATES

NO. 02-6320

JOHN J. FELLERS, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

REPLY BRIEF FOR PETITIONER

GOVERNMENT'S BRIEF IN OPPOSITION

The Solicitor General, on behalf of the United States of America, filed a Brief in Opposition with this Court on December 9, 2002. Petitioner received the Brief on or around December 16, 2002.

The Government's contention is that the Eighth Circuit Court of Appeal's opinion does not conflict with any decisions of this Court. Government's Brief, page 8 (hereinafter Gov. Br.). In arguing this contention, the Government claims that this Court has not set forth two distinct standards between

interrogation and deliberately elicit. However, the Government's contentions are misplaced.

This Court has set two different standards between Fifth and Sixth Amendment cases. For a violation of the Fifth Amendment it is whether the government interrogated a defendant. But for Sixth Amendment post-indictment interviews the Court has routinely applied the deliberate elicit standard. See, Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986)("[A]fter the initiation of adversarial judicial proceedings, the Sixth Amendment provides a right to counsel at a critical stage even when there is no interrogation and no Fifth Amendment applicability."). This Court has repeatedly stressed that affirmative interrogation, as in Rhode Island v. Innis, 446 U.S. 291 (1980), is not applicable to Sixth Amendment claims. See, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Innis, 446 U.S. at 300 n.4. In fact, under the Innis-interrogation standard, the defendant in Henry, Brewer, and Maine v. Moulton, 474 U.S. at 159 (1985), would not have had constitutional violations because they were not interrogated.

The Government also argues that the Eighth Circuit used the proper test to determine petitioner's Sixth Amendment claim. Gov.Br. page 16. The Eighth Circuit denied petitioner's Sixth Amendment claim and stated that they denied the claim because petitioner was not interrogated. The Government claims that the Eighth Circuit meant deliberately elicited and used that

standard to determine the Sixth Amendment claim. For the following reasons, the Government's contentions are incorrect.

First of all, just like when Congress drafts statutes, this Court must assume that the appeals court meant what it said. The appeals court used the word interrogation and it is preposterous to think that the court stated "interrogation" but then used the deliberately elicited test. Indeed, this was the reason for Judge Riley's concurrence. Judge Riley and the majority were in agreement that the fruits doctrine was inapplicable to the instant case. It can be presumed that Judge Riley authored his concurrence because the majority applied the wrong standard to the Sixth Amendment claim. Judge Riley stated that in determining Sixth Amendment claims the proper test is whether the government deliberately elicited information from petitioner. And Judge Riley did not use the word interrogation.

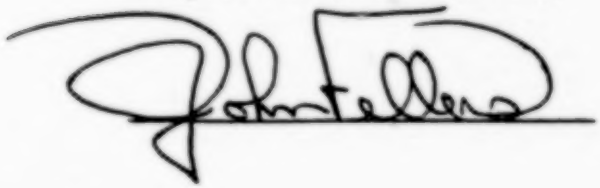
Also, it is clear that under the deliberately elicited test, there was a Sixth Amendment violation. The Eighth Circuit meant what it said. It is questionable whether there was a claim under the interrogation standard but under the proper standard there was a Sixth Amendment violation. As such, the opinion of the appeals court conflicts with many decisions of this Court and this Court should grant this writ of certioarari.

CONCLUSION

Therefore, this Court should grant this petition for a writ of certiorari.

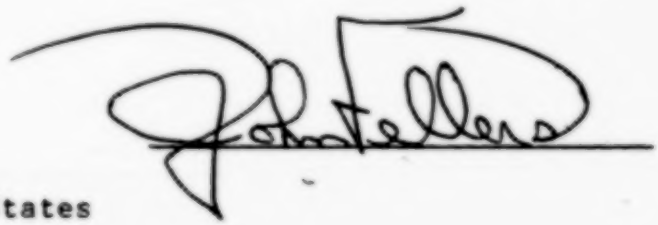
Date: 12-30-02

Respectfully submitted,



CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Reply Brief for Petitioner was sent to the parties below. Said brief was placed in the U.S. Mail, postage pre-paid, on this 30 day of December, 2002.



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No. 02-6320

In The Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed July 29, 2002
Certiorari Granted March 10, 2003

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U.S. District Court of Nebraska (4 Lincoln)

CRIMINAL DOCKET FOR CASE #: 4:00-cr-03014-ALL

Filing Date	#	Docket Text
02/23/2000	1	INDICTMENT filed by US Attorney naming John J. Fellers (1) count(s) 1: Intent to distribute, in violation of 21:846, with request for trial at Lincoln (Case filed 2/23/00 and UNSEALED 2/25/00) (ICMSUSER) (Entered: 02/28/2000)
02/24/2000		ARREST Warrant issued for John J. Fellers (ICMSUSER) (Entered: 02/28/2000)
03/29/2000	13	MOTION by defendant John J. Fellers to suppress evidence and statements (ICMSUSER) (Entered: 03/29/2000)
04/20/2000	17	MINUTES: hrg before Magistrate Judge David L. Piester – Court Reporter: Electronic recorder; Hearing held on dft's mtn to suppress [13-1]; Evidence by Plf; ORDERED: The court's report and recommendation was read into the record and no written R&R will be forthcoming but will be a part of the transcript of this hearing; The parties were informed they have 10 days from the filing of the transcript to file any objections; The R&R was read into the record on 4/20/2000; The court recommends to Judge Strom that the Motion to Suppress [13-1] be granted in part and denied in part as to defendant John J. Fellers (ETC) (Entered 04/21/2000)

04/21/2000	20	REPORT, RECOMMENDATION, AND ORDER by Magistrate Judge David L. Piester re hearing held on defendant Feller's motion to suppress [13-1]; it is recommended to Senior District Judge Lyle E. Strom that the motion to suppress be granted in the respects noted in my comments on the record, and denied in all other respects; it is ordered that: (1) this report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk; (2) when the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties; (3) the parties are notified that any failure to file an objection within the time permitted by local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation; and (4) that portion of the motion to suppress which addresses firearms found at the defendant's residence, is deemed withdrawn. – as to defendant John J. Fellers – COPIES MAILED (RDB) (Entered: 04/21/2000)
06/08/2000	24	MEMORANDUM AND ORDER by Judge Lyle E. Strom that the report and recommendation of the magistrate judge [21-1] is adopted and rejected; The unwarned statements made by the dft at his home are suppressed; Statements of the dft given at the police station are admissible as to defendant John J. Fellers – COPIES MAILED (ICMSUSER) (Entered: 06/08/2000)

01/11/2001	53	JURY VERDICT as to John J. Fellers (CJS) (Entered: 01/12/2001)
04/18/2001	69	JUDGMENT and COMMITMENT regarding minutes [67-1] sentencing John J. Fellers (1) count 1s. Dft was found guilty on Count I of the Superseding Indictment after a plea of not guilty and is committed to the BOP for 151 months, 4 years SR w/ special conditions, $100.00 SA by Judge Lyle E. Strom – COPIES MAILED (JLS) (Entered: 04/19/2001)
04/23/2001	70	NOTICE OF APPEAL by defendant John J. Fellers from district court memorandum and order of 6/8/00 [24-1], jury verdict [53-1], all adverse rulings during jury trial, and judgment and commitment [69-1], [69-2], [69-3], [69-4], and minutes of hearing 4/13/01 overruling dft's motion for new trial; with request for transcripts of trial commencing 1/8/01 and concluded 1/11/01, of sentencing hearing 4/13/01, and transcript of hearing on dft's motion to suppress [21] – COPIES MAILED; copy to Court Reporters Kathy Scheer and Brenda Fauber (ICMSUSER) (Entered: 04/24/2001)
04/11/2002	77	COPY OF OPINION USCA, 8th CIRCUIT (01-2045) re: appeal [70-1] affirming the decision of the district court as to defendant John J. Fellers (KBJ) (Entered: 04/15/2002)

05/09/2002	78	COPY OF ORDER FROM USCA 8th CIRCUIT that petition for rehearing by the panel filed by appellant has been considered by the court and is denied – as to defendant John J. Fellers (BMH) (Entered: 05/10/2002)
05/20/2002	80	MANDATE/JUDGMENT from USCA 8th Circuit as to defendant John J. Fellers affirming the jgm of the District Court [70-1] – COPIES MAILED, LES (BMH) (Entered: 05/20/2002)
03/17/2003	81	LETTER (COPY) from USCA – 8th Circuit that the motion to proceed in forma pauperis and the petition for writ of certiorari are granted – U.S. Supreme Court Number: 02-6320 as to defendant John J. Fellers (Attachments: # 1) (KBJ) (Entered: 03/17/2003)

General Docket
US Court of Appeals for the Eighth Circuit

5/4/01 Criminal Case Docketed Dist. Ct. Office: Omaha (11b)

7/12/01 BRIEF FILED – Brief of Appellant – John J. Fellers 66 pages w/addendum 10 copies – w/service 7/10/01 w/diskette. Defects: cert. of compliance incomplete (does not contain exact word count). [01-2045] [1414607] (jpp)

8/16/01 BRIEF FILED – Brief of Appellee – USA. 11,059 words w/addendum – 10 copies – w/service 8/15/01. w/diskette [01-2045] [1427009] (jpp)

10/16/01 ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES Roger L. Wollman, Chief Judge, Donald P. Lay, Senior Judge, William J. Riley, Circuit Judge. Sean Joseph Brennan for Appellant John J. Fellers. Janice Marie Lipovsky for Appellee USA. Rebuttal by: None. RECORDED. [01-2045] (jmb)

4/8/02 THE COURT: Roger L. Wollman, Donald P. Lay, William J. Riley. OPINION FILED by Roger L. Wollman. Authoring Judge PUBLISHED, CONCUR by William J. Riley. [01-2045] [1504121] (paw)

4/8/02 JUDGMENT: Roger L. Wollman, Donald P. Lay, William J. Riley. The judgment of the lower court is AFFIRMED in accordance with the opinion. [01-2045] [1504124] (paw)

4/22/02 PETITION for rehearing by the panel, filed by Appellant John J. Fellers w/service, TO COURT. [01-2045] (paw)

5/7/02	JUDGE ORDER: denying petition for panel rehearing [1509576-1] filed by John J. Fellers [01-2045] [1515000] – Published Order. (paw)
5/15/02	MANDATE ISSUED [01-2045] (paw)
9/20/02	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 9/13/02. Supreme Ct. Case No.: 02-6320 [01-2045] [1563088] (paw)
3/14/03	Notification from Supreme Court dated 3/10/03 stating that they had entered an order granting Supreme Court notice for certiorari [1563088-1] [01-2045] [1621514] in Sup. Ct. No. 02-6320. [01-2045] (paw)

[SEALED]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN J. FELLERS, Defendant.	4:00CR3014 INDICTMENT (21 U.S.C. §846) **[JUDGE STROM MAGISTRATE JUDGE PIESTER]**

The Grand Jury Charges:

COUNT I

(Filed Feb. 23, 2000)

From an unknown date, but beginning at least as early as July, 1998, and continuing thereafter up to and including at least June 1, 1999, in the District of Nebraska and elsewhere, JOHN J. FELLERS, the defendant herein, did willfully and knowingly combine, conspire, confederate, and agree together with other persons, some known and some unknown to the Grand Jury, to possess with intent to distribute and to distribute a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

A TRUE BILL

/s/ Roseanne Weber
Foreperson

/s/ Thomas J. Monoghan
THOMAS J. MONOGHAN
United States Attorney

The United States of America requests that the trial of this case be held in Lincoln, Nebraska, pursuant to the rules of this Court.

/s/ Janice M. Lipovsky
JANICE M. LIPOVSKY
Special Assistant United States Attorney

CASE # 99-028249

LINCOLN POLICE DEPARTMENT

INTERVIEW REPORT

NAME John J. Fellers ADDRESS 806 Westward Road

CITY/STATE Lincoln NE

OFFICER Jeff Bliemeister OFFICER _____

DATE 2/04/2000 TIME 1706

MIRANDA WARNING AND WAIVER FORM

1. I would like to advise you that I am a Police Officer. Do you understand that? Yes
2. You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that? Yes
3. Anything you may say can be, and will be, used against you in a court of law. Do you understand that? Yes
4. You have the right to talk to a lawyer and have the lawyer with you during the questioning. Do you understand that? Yes
5. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning, at no cost to you. Do you understand that? Yes
6. Knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? Yes

/s/ Jeffrey [Illegible] Bliemeister [Illegible]
(Witness)

/s/ John Fellers
(Subject's signature)

/s/ [Illegible] Garrett

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN J. FELLERS, Defendant.	)))))))	CASE NO. 4:00CR3014 HEARING ON DEFENDANT'S MOTION TO SUPPRESS (Filed May 2, 2000)

Hearing held before the HONORABLE DAVID L. PIESTER, United States Magistrate Judge, on April 20, 2000 in Lincoln, Nebraska.

APPEARANCES:

MS. JAN LIPOVSKY
Attorney at Law
555 South 10th Street
Lincoln, Nebraska 68508-2803 for Plaintiff.

MR. SEAN J. BRENNAN
Attorney at Law
140 North Eighth Street, #340
Lincoln, Nebraska 68508 for Defendant.

[2] (Whereupon, the following proceedings took place at 9:00 a.m.:)

THE COURT: Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor. This is a case of United States of American [sic] versus John J. Fellers: It's found at Docket 4:00CR3014. I would ask the record to reflect my presence for the United States. Mr. Fellers is present with his counsel.

We are here today regarding the motion to suppress evidence and statements that was filed by Mr. Fellers. I would advise the Court that I have had an opportunity to talk with Mr. Brennan prior to the beginning of this hearing. As the Court's probably aware, in my response I indicated that the Government does not intend to use the guns that were taken from the home and we don't have any problem turning them over to an appropriate person. I spoke with Mr. Brennan about that, and I believe he's agreed to withdraw that part of the suppression motion with that understanding.

THE COURT: Is that correct, Mr. Brennan?

MR. BRENNAN: Yes, that is correct, with the understanding that the Government's statement to the Court that they will not be using the guns as evidence in this case and are willing to turn custody of those [3] weapons over to a person other than Mr. Fellers, we would withdraw the portion of the motion to suppress that refers to the guns and that the hearing would then proceed on the motion to suppress the statements and not the evidence.

THE COURT: Very well. Do either of you wish to make an opening statement?

Mr. Brennan?

MR. BRENNAN: No, I would waive opening statement.

MS. LIPOVSKY: I would also waive.

THE COURT: All right. And are there witnesses here other than – who's the first witness?

MS. LIPOVSKY: I have two witnesses that are both outside. Mr. Brennan had indicated he did want a sequestration order.

THE COURT: All right.

MR. BRENNAN: And there are no other witnesses in the courtroom.

THE COURT: All right. If somebody comes in, you can let me know and I'll advise them accordingly.

You can call your first witness.

MS. LIPOVSKY: Thank you.

THE COURT: Please come forward to the clerk's desk to be sworn.

[4] THE CLERK: Please state your full name for the record.

THE WITNESS: Jeff Bliemeister. B-l-i-e-m-e-i-s-t-e-r.

THE CLERK: Please raise your hand.

Do you solemnly swear or affirm the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I swear.

THE CLERK: Please have a seat in the witness chair.

JEFF BLIEMEISTER

having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Please state your business address.

A. 575 South 10th Street in Lincoln.

Q. By whom are you employed?

A. The Lancaster County Sheriff's Office.

Q. And in what capacity are you employed there?

A. I am currently employed as a deputy sheriff and assigned to the Lincoln Lancaster County Narcotics Task Force.

[5] Q. How long have you been a law enforcement officer?

A. Since March of 1996.

Q. And how long have you worked with narcotics?

A. Approximately two years and four months.

Q. What are your general duties as a member of the narcotics task force?

A. I'm assigned to investigate persons involved in the distribution of multiple different kinds of narcotics, both through what we call street enforcement and also through historical cases.

Q. When you work on historical cases, do you obtain and make yourself aware of information obtained from other officers through various sources?

A. Yes.

Q. Do you review reports prepared by them?

A. Yes.

Q. And have you become ever involved with debriefing or proffer interviews of cooperating individuals?

A. Yes, I have.

Q. Do you use that information in assisting you in historical investigations?

A. Yes.

Q. (Coughing) Excuse me. And have you had [6] training and education to assist you in performing your duties as a law enforcement officer?

A. I have.

Q. Have you been involved in the investigation of John Fellers?

A. Yes.

Q. And is John Fellers present in the courtroom today?

A. He is.

Q. Could you identify him for the Court, please.

A. Mr. Fellers is seated to the right of the defense counsel. He's wearing a striped, lighter colored shirt and blue jeans.

MS. LIPOVSKY: I ask the record reflect the witness has identified the defendant.

THE COURT: It will.

Q. (By Ms. Lipovsky) Deputy Bliemeister, were you involved in contacting Mr. Fellers on February 24th of the year 2000?

A. Yes.

Q. Was that the first time you'd had contact with Mr. Fellers?

A. No.

Q. When did you first meet Mr. Fellers?

A. I believe I first met Mr. Fellers in 1995 [7] while doing volunteer work at Lincoln General Hospital.

Q. And on – so was this a person that you knew by sight?

A. Yes, it was.

Q. On the 24th of February, then, where did you have contact with Mr. Fellers?

A. At Mr. Fellers' house at 806 Westward Road in Lincoln.

Q. Were you alone or was someone with you?

A. I was accompanied by Sergeant Garnett.

Q. And what was your purpose for you and Sergeant Garnett going to 806 Westward Road?

A. A federal grand jury had returned an indictment for conspiracy to distribute methamphetamine regard – on Mr. Fellers and we went there to arrest him.

Q. Was this an apartment or a residence?

A. It's a home.

Q. Like a single-family residence?

A. Yes.

Q. When you got to this home, how did you make contact with Mr. Fellers?

A. When we walked up, the, what I call, storm door was closed but the – the main front door was open. We knocked on the storm door and waited for Mr. Fellers to come to the door.

[8] Q. Who came to the door?

A. Mr. Fellers did.

Q. And when Mr. Fellers came to the door, what was the first thing that you and Sergeant Garnett did?

A. Acknowledged John and showed him our badge and commission cards identifying ourselves.

Q. At that time were you and Sergeant Garnett in uniform?

A. No.

Q. And at – when you work with the narcotics task force, do you wear uniforms or plain clothes?

A. Plain clothes.

Q. Did Mr. Fellers appear to be able to identify you?

A. Yes.

Q. After you identified yourself as police officers, what was the next thing that happened?

A. Mr. Fellers – we asked if we could come inside. He invited us inside. Sergeant Garnett and myself walked in and Mr. Fellers offered us a seat.

Q. Where did you sit?

A. I didn't sit.

Q. And did Sergeant Garnett sit?

A. I don't think so, but I don't remember for sure.

[9] Q. Did Mr. Fellers sit?

A. He did.

Q. What room were you in?

A. I'd describe it as a living room which is the first room off the – the entrance to the residence.

Q. And when you entered into the living room, did Mr. Fellers immediately sit down?

A. Shortly thereafter, yes. I don't know if it was immediately. He walked to the couch and sat down, but it was within a minute or two.

Q. (Coughing) Excuse me. And did you explain to Mr. Fellers why you were there?

A. We did.

Q. What did you tell him?

A. I told Mr. Fellers that we were there to discuss his involvement regarding the distribution of methamphetamine. I then told Mr. Fellers, in fact, we had a federal arrest warrant – or the Grand Jury had returned an indictment regarding him for conspiracy to distribute methamphetamine.

Q. What – after you told Mr. Fellers that he had been indicted, what did you or Mr. – you say or did Mr. Fellers have a response?

A. I believe I specifically said that this indictment was regarding his association with persons [10] such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, Mark Farfalla. At that point Mr. Fellers indicated to us, that at that point in his life, which I took to mean at the point when he was associated with these persons, he had a lot of personal problems in his life.

Q. Did you begin questioning him about those personal problems?

A. No. Mr. Fellers began to offer us information regarding – he started talking about how he was going through a divorce. He was having business problems with a former business partner.

Q. Did you ask him questions about his association with Kathi Kuenning?

A. No.

Q. Did you ask him questions about his associations or drug trafficking with Pat Sardeson?

A. No.

Q. Did you ask him any questions in that regard regarding Thomas Geffs?

A. No.

Q. Did you ask him any questions regarding I think it was Mark Farfalla?

A. No, I did not.

Q. Did you – you or Sergeant Garnett ask him any questions when he was talking about his problems, his [11] personal problems, regarding his drug trafficking?

A. Not regarding his drug trafficking, no.

Q. During the time that Mr. Fellers was – was discussing his – or telling you about his personal problems, was this still going on in the living area?

A. Yes, it was, the living room area.

Q. What did – what did his demeanor appear to be?

A. To me, it was pretty relaxed. Mr. Fellers was seated on the couch in the living room. He was drinking a mug of tea or something like that, water, a large mug that you get at a Kwik Shop. He seemed pretty relaxed, pretty intent on telling us that his problems, during the time period – or during the period that he associated with these people, brought him a lot of grief, I guess I would say.

Q. Did (coughing) – excuse me. Had you also had contact with Mr. Fellers in March of '99?

A. Yes, I did.

Q. Where did that take place?

A. Again, that was at Mr. Fellers' residence at 806 Westward Road.

Q. And have you ever heard the expression "knock and talk"?

A. Yes, I have.

Q. What does that mean?

[12] A. It's a technique that we use regarding multiple aspects of police investigation. It's where we go to a residence – this one specifically was dealing with a Crime Stopper allegation against Mr. Fellers back then – we knock on the door, identify ourselves, discuss the allegations that have been made by whoever it is at that point that we're referring to was made by an unknown call to Crime Stoppers and go into it and question Mr. Fellers regarding that.

Q. On that occasion, did he talk to you?

A. Yes, he did.

Q. And did you arrest him after that?

A. No, we did not.

Q. Could you – or do you recall approximately how long Mr. Fellers talked about his personal problems on February 24th?

A. Not exactly. I would – my best estimate would be approximately five to ten minutes, somewhere in there.

Q. During that time, did he make any statements regarding drug or narcotics trafficking?

A. Did I?

Q. Did he?

A. He did admit that he had been using – using methamphetamine at the time period when he was associated [13] with Kathi, with Thomas Geffs, Pat Sardeson.

Q. And was that the statement that you earlier testified to?

A. Yes.

Q. Other than that, did he say anything?

A. Not – no.

Q. And how did this conversation end?

A. Basically, it ended because, number one, we were pretty busy on that evening. There was a lot of radio traffic going on. We needed to take Mr. Fellers to jail so that we could move on with our day. It was ended by either myself or Sergeant Garnett, I don't know who, saying, John, we need to get going, we need to take you down to jail.

Q. And did Mr. Fellers, then, prepare to go to jail?

A. Yes.

Q. Do you remember how he got to the jail?

A. Yes.

Q. How was that?

A. Sergeant Garnett and I had to transport him in our unmarked police vehicle because there were no marked cruisers available. They were all out of service on other calls.

Q. And you and Sergeant Garnett, were you in the [14] same vehicle?

A. We were.

Q. During the period after the conversation ended – or after you've indicated – sorry – to Mr. Fellers – or you or Sergeant Garnett indicated that the conversation kind of needed to end because you needed to get on with your day, from that point until Mr. Fellers got into the car did you or Sergeant Garnett question him regarding narcotics trafficking?

A. No.

Q. Did Mr. Fellers continue to talk about his personal life to some extent?

A. He did.

Q. Was there anything in that that you found was related to his activities with the individuals you had earlier mentioned?

A. No.

Q. And during the time that Mr. Fellers was being transported to the jail, did you or Sergeant Garnett question Mr. Fellers?

A. Regarding narcotics? No. And we didn't question him specifically other than when we – when we went down to get his shoes. We questioned him about the guns.

Q. Not about drugs.

[15] A. No, ma'am.

Q. Okay. And when – again, on the car, was anybody interrogating or questioning Mr. Fellers during the car ride?

A. No.

Q. Was he talking during that ride?

A. He was.

Q. What was he talking about?

A. He was talking about a land dealing that he had, and I don't know if it was a former business partner or what, but it was – basically his involvement with some kind of land dealing that had either gone bad or hadn't turned out the way he wanted it to turn out.

Q. Was Mr. Fellers booked into the prison? Or actually the jail, I guess.

A. Into Lancaster County Jail, yes, he was.

Q. Did you and Sergeant Garnett have an opportunity to talk with him after that?

A. Yes, we did.

Q. Where did that take place?

A. It took place in a room adjacent to the book-in area at Lancaster County Jail, an interview room there.

Q. Who all was present for that?

A. Myself, Sergeant Garnett and Mr. Fellers.

[16] Q. And why were you, Sergeant Garnett and Mr. Fellers in that room?

A. To conduct an interview or attempt to interview Mr. Fellers.

Q. Did Mr. Fellers indicate that he was willing to talk to you?

A. He did.

Q. Are you familiar with the Miranda warnings form?

A. I am.

Q. And what is the purpose of the Miranda warnings form?

A. The purpose is to advise someone that we have in custody that we want to, number one, interview them, but we advise them of their rights to remain silent, to have an attorney present with them during any questioning. And if they cannot afford an attorney, to have one appointed for them prior to any questioning.

Q. Did you advise Mr. Fellers of his rights?

A. Yes.

Q. Did you use a written form to do that?

A. Yes.

Q. And how did you use the written form?

A. I read each question, asking Mr. Fellers to respond yes or no to each question. I then wrote the [17] response by Mr. Fellers adjacent to each question. I signed it. Mr. Fellers signed it and Sergeant Garnett signed it.

MS. LIPOVSKY: May I approach the witness?

THE COURT: Yes.

Q. (By Ms. Lipovsky) Deputy Bliemeister, I've given you what is marked as Government's Exhibit Number 1. Have you seen that before?

A. Yes.

Q. What is Exhibit Number 1?

A. It is a photocopy of the Miranda warning waiver form that I use – or read to Mr. Fellers.

Q. Is that a true and accurate copy of the original?

A. It is.

Q. Whose handwriting appears on that document following the top until the line that's identified by the number 6?

A. That is my handwriting.

Q. Did you complete it at the time of the interview?

A. I did.

Q. And are there two signatures at the bot – or actually there are three signatures at the bottom.

A. Yes.

[18] Q. Is one of those yours?

A. Yes.

Q. And did you see Mr. Fellers sign this document?

A. I did.

Q. And does his signature appear on that document also?

A. Yes.

Q. And did you also see – you also see the signature of Mr. – Detective Sergeant Garnett on that?

A. Yes.

MR. [sic] LIPOVSKY: I would offer Exhibit 1.

MR. BRENNAN: No objection.

THE COURT: Received.

Q. (By Ms. Lipovsky) Where does Mr. Fellers' signature appear on the document?

A. Under the line premarked subject's signature. It's on the lower right-hand portion of the Miranda form.

Q. And where is your signature?

A. Directly adjacent to that on the line marked "witness."

Q. And can you advise the Court the questions that you asked Mr. Fellers regarding waiving his Miranda rights and his answers?

A. Yes. Would you like me to read them?

[19] Q. Yes.

A. Okay. I want to advise you that I'm a police officer. Do you understand that? I wrote yes. That was Mr. Fellers' response. You have the right to remain silent, not make any statements or answer any of my questions. Do you understand that? Again, I wrote yes. Anything you

may say can be and will be used against you in a court of law. Do you understand that? I wrote yes. You have the right to talk to a lawyer and have a lawyer with you during the questioning. Do you understand that? I wrote yes. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no cost to you. Do you understand that? I wrote yes. And knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? And, again, I wrote yes, which was Mr. Fellers' response.

Q. Did you proceed to ask Mr. Fellers some questions?

A. I did.

Q. And did Mr. Fellers respond?

A. Yes, he did.

Q. During the time that you were interviewing Mr. Fellers, did anyone else come into the interview?

A. No.

[20] Q. And during the time of this interview, did either you or Detective Garnett leave?

A. No.

Q. (Coughing) Excuse me. At any time did Mr. Fellers request to have an attorney present before answering any questions?

A. He did not.

Q. Did you promise anything to Mr. Fellers in return for him making a statement?

A. No.

Q. Did you make [sic] promise, direct or implied, to Mr. Fellers that a confession or admission would result in benefit or advantage to him?

A. No.

Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?

A. No.

Q. (Coughing) Excuse me. Did Mr. Fellers appear to understand what you were saying to him when you read him his rights?

A. Yes, he did.

Q. Did Mr. Fellers ever invoke his right to remain silent?

A. He did not.

[21] Q. Did Mr. Fellers' responses during this interview appear to follow the questions that you were asking?

A. Yes.

Q. Did he appear to understand the questions that you were asking?

A. Yes, ma'am.

Q. And did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?

A. Yes.

Q. And did he appear to freely, voluntarily and intelligently waive his right to have an attorney present?

A. Yes, ma'am.

Q. Did – or do you recall, actually, the questions that you asked Mr. Fellers during this interview?

A. I do.

Q. And can you advise the Court of the questions you asked and his responses.

A. I can.

Q. Could you do that, please.

A. Initially, I began to question Mr. Fellers regarding his involvement with an individual by the name [22] of Thomas Geffs. Thomas Geffs is also known by Slick; it's a nickname that he goes by. And Mr. Fellers acknowledged that he knew Thomas Geffs by the nickname of Slick. I asked Mr. Fellers if he had ever obtained methamphetamine from Slick and he said that he had not.

I then moved my questioning to a person by the name of Patrick Sardeson. Again, Mr. Fellers said that he knew Patrick Sardeson and also indicated that he had met Thomas Geffs through Patrick Sardeson. I believe, at one point in time, he said that the two had been living together.

I asked Mr. Fellers if he obtained methamphetamine from Pat Sardeson and he said that he had. He specifically indicated that he had obtained gram [sic] one-eighth ounce, described them as user quantities of methamphetamine, from Patrick Sardeson.

I asked him if he knew of any of the methamphetamine that he had got from Pat Sardeson had come from Thomas Geffs. He said that on one occasion he believed – he didn't know for sure, but he believed – a gram that he had got from Pat had come from Thomas Geffs.

We then moved our questioning to an individual by the name of Kathi Kuenning.

Q. First, did you ever ask Mr. Fellers if he'd received ounce quantities of methamphetamine from Patrick [23] Sardeson?

A. Yes, I did.

Q. Okay. And what was his response about that?

A. He had not.

Q. Okay. I'm sorry to interrupt you. You said you asked him questions about Kathi Kuenning?

A. Yes.

Q. And what did you ask him? What was Mr. Fellers' response?

A. Mr. Fellers again said that he had known Kathi Kuenning for a long time. They were, personal friends. My questioning specifically dealt with his involvement with Kathi regarding the sale of methamphetamine. He indicated that he had obtained methamphetamine in, again, user quantities from Kathi in the past. I think I specifically questioned him whether or not he had received, again, ounce quantities from Kathi and he said no way had he – he said that he had obtained gram one-eighth ounce quantities from her but nothing more than that. I asked him if he had ever seen Kathi in possession of

additional quantities of methamphetamine and he said that Kathi always had quite a bit of meth on her. I asked him specifically if he had ever seen her in possession of ounce quantities. He said that he had. I would – kind of went up the scale from there asking if he [24] had ever seen her in possession of quarter-pound quantities. He said no that he had not. But he did indicate that he had seen her in possession of two-ounce quantities of methamphetamine, and I can't specifically remember on how many occasions or if he detailed how many occasions that was on.

At that point, I had previous information I was the person that had done – given the Grand Jury the testimony regarding Mr. Fellers. I knew quite a bit about what people had alleged against him during the proffer interviews I had conducted with him and by reading reports of other officers.

I asked Mr. Fellers if he had been supplying Kathi Kuenning with money to purchase methamphetamine. Mr. Fellers said that he had been supplying money to Kathi but he did not know or did not believe that it was for the – for methamphetamine specifically. In fact, he went on to say that he remembered giving her money on at least one occasion to pay a cellular phone bill that Kathi needed to pay to keep her cell phone on.

I think at that point in the interview we moved on to questioning regarding other persons, one being a Mark Farfalla. Mr. Fellers said that he had known Mark Farfalla for quite some time. He had known his sister, Mark's sister, Shelly Farfalla, who lived in Omaha also. [25] I asked Mr. Fellers where he had met Mark or how he'd become associated with Mark. And he said while on work

release or in prison, I can't remember which one, he had met Mark Farfalla.

I specifically questioned him regarding obtaining methamphetamine from Mark Farfalla.

Q. Did you ask him about obtaining methamphetamine in December of 1998?

A. Yes. That was the time period that I was questioning in regard.

Q. And what was his response?

A. He indicated that – he went into this story about how he had become reacquainted with Mark Farfalla. He and Kathi had traveled to Omaha, Nebraska and they were at a convenience store or grocery store or something there. And he said it was just a chance meeting that he had run into another old friend of his that was an associate of Mark Farfalla. They began talking about Mark and this friend was either planning on going over to Mark's house or they went to Mark's house. But, in any event, Mark, this friend and Kathi traveled over to Mark Farfalla's residence in Omaha, Nebraska.

I started questioning regarding whether or not that he had made – or got methamphetamine from Mark on this occasion. And Mr. Fellers was pretty evasive about this [26] question, basically saying that they had used methamphetamine with Mark, with Kathi on this date but whether or not he directly obtained it from Mark, I don't recall him saying that.

I questioned him regarding whether or not Kathi Kuenning had ever been – or he had made the introduction of Kathi Kuenning to Mark Farfalla for the sole

purpose of obtaining methamphetamine. John said at this point in time he knew that Kathi was selling methamphetamine. And I believe later – I'm trying to think exactly how he said it – in any event, Mr. Fellers basically said that Kathi had obtained methamphetamine from Mark Farfalla later on. But whether or not the introduction by him to Mark – or by Kathi – by John Fellers to Mark Farfalla and Kathi Kuenning, the introduction of those two was specifically for the intent of Kathi to get another source, that information was not fully – it wasn't – he said it was not that – for that reason.

Q. Did you discuss with Mr. Fellers any phone information that you had linking him and Mark Farfalla?

A. I did.

Q. And what was that conversation?

A. I told Mr. Fellers that I had, through the course of this investigation, I had phone information that I believed connected him to Mark Farfalla and [27] discussing purchasing narcotics. Again, Mr. Fellers said that at this point in his life, meaning this time period in his life, he was a heavy user of methamphetamine. He had a lot of personal problems. Things were a little bit unclear in his memory. He did say that he believed he may have had a phone contact on one occasion at least and possibly more where he said that they had made reference to obtaining a package of meat. John told me he knew what Mark was talking about. They were talking about obtaining methamphetamine. But when I questioned John further regarding this, he really – he was evasive in his questioning – or evasive in his answers, not wanting to commit one way or another to – whether or not he had obtained methamphetamine directly from Mark Farfalla.

Q. Did you ask Mr. Fellers about fronting money to anyone?

A. I did. Part of this case information that I had previously had – had gone to the Grand Jury with was that basically John was bankrolling Kathi Kuenning, supplying her money. She would make the purchases of methamphetamine from Mark Farfalla, among others, with both his money and money that she had. He, again, said yeah, I loaned Kathi Kuenning some money, specifically bringing up the instance of the cellular phone bill.

I questioned him further regarding this and he [28] indicated that he had loaned Kathi money on – on more than one occasion. He said that he had bonded her out of jail when she was arrested on State charges for delivery of a controlled substance. He said he had his suspicions about where some of this money was going, but he never asked Kathi. He never got a concrete answer, yes, this was for methamphetamine and I need to pay off a drug debt or I need to get more methamphetamine. He just said he loaned her money. She was a very good friend. One reason was for the phone bill. He had his suspicions that some of this was for narcotics but didn't know for sure.

Q. Did you ask Mr. Fellers any questions about a person whose name is Val?

A. Yes, I did.

Q. What was the question – what were the questions and what were Mr. Fellers' answers?

A. Val was another person that I knew from previous parts of this investigation, was a source for methamphetamine for Kathi Kuenning after Mark Farfalla had went to prison in early 1999 for possession with intent to

distribute methamphetamine. I told – I asked if he had ever met Val, who I knew to be a source from a proffer interview conducted with multiple persons in this case. He said he didn't think that he had. Maybe on one [29] occasion he had met her. I asked if he had ever got methamphetamine directly from Val. He said that he had not.

Q. And, I'm sorry, did you already say who Val actually was, if you were able to identify who Val was?

A. Val – I know Val's last name. Her name is Valerie Green. She liv – at that point in time, she resided in Omaha. We have never had – we haven't had any direct contact with Val as part of this investigation, only through – we've identified her through Kathi Kuenning's testimony and also through analysis of cellular tolls.

Q. Did – were you present when Detective Sergeant Garnett asked any questions of Mr. Fellers?

A. Yes, I was.

Q. Do you recall what was asked and Mr. Fellers' response?

A. Yes. Sergeant Garnett began questioning and John had indicated to us on multiple different points during this interview that he was a heavy user. Sergeant Garnett basically asked him about his use, how it started, how he used and believe he initially began – I can't say for sure; I don't remember how he initially began using it. But at some point in time, he began smoking methamphetamine on tin foil. Later, he said that [30] Kathi Kuenning had shown him how to bang – or to inject methamphetamine into the blood stream, and he said that that's how his use had progressed from smoking to now injecting. And he indicated that at some points during the time period when

he was dealing with Kathi, he was injecting at least a quarter gram at a time.

Q. Did Mr. Fellers make some more comments about his personal and business problems at that point?

A. Yeah. Again, that was kind of hit and miss throughout this interview where Mr. Fellers was talking about his problems with his ex-wife, his problems of his ex-business partner.

Q. Um, how did you respond to Mr. Fellers' statements during this after he'd been telling you this information?

A. Just – from based upon extensive research that I had done in this investigation, all the different interviews and Mr. Fellers' statements to this point, you know, I thought that Mr. Fellers was – was telling us about half the story, you know. I didn't – in my mind, I did not believe that Mr. Fellers could be fronting all this money to Kathi. Kathi would show him these additional quantities of methamphetamine. He knew that she was getting it from Mark Farfalla and I just didn't believe that his involvement had – had stated that based [31] upon his information that he'd given me and then all the other interviews that I had done. I told John this: that I believed he was splitting hairs, that he wasn't being a hundred percent truthful, that he was, you know, on the right road, but not – not completely coming forth.

Q. Did you continue to – the interview at that point?

A. There may have been some more interview regarding the fronting of the money to Kathi Kuenning, the borrowing of the money, trying to actually delineate exactly what the money was for, how much money it was,

but at some point, this was pretty much the end of the interview.

Q. That additional information, was, it basically reflective of what he'd already told you and what you've already testified to?

A. Yes, ma'am.

Q. Did you ever ask Mr. Fellers again if he sold methamphetamine to Patrick Sardeson?

A. I did.

Q. And what did he say?

A. He said he'd never sold it to him.

Q. Did you ask him if he ever shared it with him?

A. I did.

Q. And what did he say?

[32] A. He said he had shared methamphetamine with friends and Patrick Sardeson was one of those people he'd shared methamphetamine with.

Q. Did the name Leon Thompson come up?

A. Yes.

Q. And what did Mr. Fellers say about Leon Thompson?

A. Leon Thompson, another person I knew associated with this investigation, I brought Leon Thompson's name up to Mr. Fellers. Mr. Fellers said, yeah, I know Leon, he's a friend. Asked him if he had sold methamphetamine to

Leon. He said he'd never sold. He said that he had shared methamphetamine with Leon.

Q. Did Ernest Lawrence come up?

A. Yes.

Q. How did that happen?

A. Mr. Lawrence was a person that I had interviewed during this case during a proffer interview. I had in for – had information that John had possibly sold him methamphetamine on one occasion so I asked John if he'd ever sold methamphetamine to Ernie Lawrence. He said that he had not.

Q. Was there – were there any other questions that were asked of Mr. Fellers that – specifically regarding narcotics that you recall at this time?

[33] A. Not anything more specific than what I've just testified to.

Q. Was there any other information that he provided that you recall at this time that you've not already testified to?

A. No.

Q. At the end of the interview, then, what did you and Sergeant Garnett do?

A. At the end of the interview, as we always do in interviews such as these, or at least I always do, I told John about the charges that he was facing. I told him that he would be brought in front of a magistrate and that his release or conditional release would be based upon that appearance. I told John if he'd be appointed counsel or

he'd – he would have to buy or pay for counsel. And I told him that if he did not believe that he was involved in the distribution of methamphetamine to let his attorney know this and that – to take this case to court. I did tell him, though, that if he felt that his involvement was more or he felt his involvement in the distribution of methamphetamine was significant, that he should disclose this a hundred percent to his defense attorney and that we would be interested in doing what is called a proffer interview with Mr. Fellers, then explained what a proffer interview was.

[34] Q. Did that finish the interview that you had with Mr. Fellers on that date?

A. It did. I guess to clarify that it finished the interview in that room, brought Mr. Fellers back out to the booking area. I told John that I wasn't going to book him in on these firearms that we had found in his residence at this time. And he all – basically, there was some conversation that if the county attorney chose not to prosecute, he would like to have these turned over to his family in Lexington, Nebraska.

Q. Did all this occur in Lincoln, Nebraska?

A. It did.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross-examination?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. You indicated that you first met Mr. Fellers in 1995 when you were doing volunteer work at Lincoln General Hospital?

A. That is correct.

Q. Were you both doing volunteer work at that time?

A. Yes.

[35] Q. And how well acquainted did you get with him then?

A. I can only specifically remember meeting him on one occasion.

Q. What type of volunteer work was this?

A. Well, it was in the intensive care unit of Lincoln General Hospital, Bryan LGH West, I guess, now, kind of a family liaison type of thing for critical care patients up there.

Q. And when you had your next meeting with him in March of 1999, did you recognize him at that time from that previous occasion at Lincoln General?

A. I did, yes.

Q. Did you –

A. I had also seen pictures prior to contacting John and recognized, yeah, this is the same person.

Q. Okay. And did you mention that to him? Did you talk about your previous acquaintanceship?

A. I think that I did in March of 1999. 1 think I remember talking to him and telling him that I had met him up there.

Q. And your contact with him in March of 1999, that was specifically on March 11, 1999?

A. I believe – I'd have to review the ACI to say it was exactly that date.

[36] Q. Okay. You generated an additional case information report as a result of that contact?

A. I didn't, no.

Q. But there was one prepared by another officer?

A. Yes, there was.

Q. That would have the date that you got the Crime Stopper call and the date that you had the contact?

A. Yes, it would.

MR. BRENNAN: May I approach the witness, please?

THE COURT: Yes.

Q. (By Mr. Brennan) I'm showing you a document that's captioned "Lincoln Police Additional Case Information." Is that correct?

A. It is.

Q. And is that the ACI that you referred to concerning the March '99 contact?

A. It is.

Q. And does it indicate that the Crime Stopper call came in on December 12, 1998?

A. Yes.

Q. And that surveillance was conducted on Mr. Fellers' residence on that date?

A. Surveillance was conducted on the 28th of 1998 and the 16th of January, 1999.

[37] Q. And then later on March 11, 1999 you actually contacted him and spoke with him.

A. That is correct.

Q. On that March 11, 1999 occasion were you dressed in plain clothes the way you were when you talked with him in February of 199 – 2000?

A. A similar dress, yes.

Q. And did you arrive at his residence in an unmarked vehicle on that occasion?

A. Yes.

Q. Were you alone?

A. No.

Q. So you were with another officer, a Lincoln police officer?

A. Yes, I was.

Q. That was Officer Dalton?

A. Correct.

Q. And he was also dressed in plain clothes?

A. He was.

Q. And you knocked on the door on that occasion?

A. Yes.

Q. And Mr. Fellers answered the door?

A. Yes.

Q. And you showed him your badge and your commission card?

[38] A. That is correct, sir.

Q. And so did Officer Dalton?

A. Yes.

Q. And you told him that you were there to talk to him about drug activity?

A. The investigator – it was Investigator Dalton's case; it was assigned to him. The majority of the talking initially was done by Investigator Dalton.

Q. And what Investigator Dalton told him was is that they – that you had this report that he'd been involved in some drug activity?

A. That is correct.

Q. And that that's what that – you were there to talk to him about?

A. Yes, sir.

Q. And you asked him if he would agree to talk to you?

A. Basically. I don't know if that specific words were mentioned. We got – we do these Crime Stopper things all the time. We indicate that the allegations are made to Crime Stoppers by an unknown caller, not by the Lincoln Police Department, and told him that we wanted to discuss these allegations with him basically.

Q. And to search his residence?

A. We did ask consent – or Investigator Dalton [39] asked consent to search his residence, that is, yes.

Q. And he allowed you to search his residence?

A. He did.

Q. And he answered your questions?

A. He did.

Q. And there was no evidence found during the search?

A. No, sir.

Q. And how long did that contact last?

A. I really can't remember for sure. It's a long time ago.

Q. What does – what would you estimate that would have taken?

A. Half hour or less.

Q. But when you contacted him again, the last time, that was February 24, 2000.

A. Yes, sir.

Q. And you went to his residence with a Lincoln police officer, and each of you were dressed in plain clothes?

A. Yes.

Q. Driving an unmarked vehicle.

A. Yes.

Q. And you knocked on the door again.

A. Yes, sir.

[40] Q. And Mr. Fellers answered the door.

A. Yes.

Q. You again showed him your badges and your cards, the way you had done previously?

A. Yes.

Q. Except this time you told him that you had a federal warrant for his arrest.

A. That is correct, sir.

Q. And the first thing you told him was that you needed to discuss with him his involvement in the use and distribution of methamphetamine.

A. That is correct.

Q. And then the very next statement you made to him was that he'd been indicted by a federal grand jury, that you had a warrant for his arrest and that you were there to arrest him.

A. That's the general context of that, yes, sir.

Q. So it's clear that that was the ultimate purpose of going there was to arrest him.

A. That was the purpose.

Q. And it's clear that that was what you made a point of telling him when you began your conversation with him.

A. Yes, sir.

Q. And at that time did you advise him of his [41] right to remain to silent?

A. No, sir.

Q. And at that time did you advise him of his right to have an attorney present during questioning?

A. I did not.

Q. And in response to your comment of wanting to discuss his use – his involvement in the use and distribution of methamphetamine, he sat down and asked you what you wanted to talk about.

A. No, not specifically. He did sit down – he did sit down at some point, yes.

Q. And he offered you a seat.

A. He did.

Q. To discuss whatever you needed to discuss.

A. That is correct.

Q. And that's when you told him that you wanted to talk to him about Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. After I had told him that we had a federal indictment for his arrest regarding his involvement with the people that you have just mentioned, sir.

Q. Okay. And that you wanted to talk to him about his involvement with those people.

A. I guess, could you clarify the question a little bit further?

[42] Q. He asked you to sit down to discuss whatever you wanted to discuss.

A. Yes.

Q. He sat and you didn't.

A. That is correct.

Q. You told him you wanted to discuss his involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. Yes.

Q. And he indicated to you that he knew those people.

A. He did.

Q. Well, you didn't go person by person, but in general he responded that he knew who you were talking about.

A. I took it to mean that because he responded by saying at that point in my life, meaning when he was associated with these people – and, like I told Miss

Lipovsky, that's when he started talking about a lot of personal problems in his life.

Q. And at that time did he identify Thomas Geffs by that name or did he refer to him as somebody named Slick?

[43] A. I think he referred to him as Slick.

Q. And did you refer to that person as Slick as well?

A. I said Slick is Thomas Geffs.

Q. And was this conversation that you had with him there at his residence tape recorded?

A. No, it was not.

Q. And at that time the statements that he made to you amounted to using methamphetamine?

A. Not only – he was talking about how his life was in disarray, I guess is the general consensus of what I took. Included in that, not only with his problems with his ex-wife, his business partner, was that he was using methamphetamine, yes.

Q. But not involved in the distribution of it.

A. No. In fact, to the best of my recollection, there was no conversation about his distribution of methamphetamine.

Q. And at that time, you indicated that he was drinking something from a mug.

A. Yes.

Q. Do you know what it was?

A. I don't know for sure.

Q. Did you ever look in the mug to see what it was?

[44] A. No.

Q. And you arrived at the residence and knocked on the door at 1624 hours?

A. Yes.

Q. And you left the residence to take him to the jail at 1639 hours?

A. I'd have to refer to, my report specifically, but it does – that time does sound right.

Q. So the time you spent with him thereat the house before leaving was 15 minutes.

A. Roughly, yes.

Q. During the time that – what type of car was it that you had?

A. We switch cars a lot.

Q. Do you remember?

MS. LIPOVSKY: Objection. Relevance as to specifics.

THE COURT: Sustained.

Q. (By Mr. Brennan) During the time that you were in whatever car you were in, was – were either you or Detective Garnett in possession of a tape recorder?

A. No.

Q. Is there any tape recording that you're aware of of the conversation in the car?

A. No, sir.

[45] Q. Do you remember what time you arrived at the jail?

A. I can testify to the time that we read him Miranda, but exactly what time we arrived at the jail, it would have been in the near vicinity of 5 o'clock, not – I can't say to the minute, sir.

Q. And when you say 5 o'clock, you're referring to 5 o'clock in the afternoon.

A. Yes, sir.

Q. Did you book him into the jail before the interview?

A. By booking – what do you specifically mean by booking him in, sir?

Q. What do you mean when you say booking?

A. When I say booking, I mean thumbprints, photographs, the whole process. All that had not been done. We had brought Mr. Fellers out, I typically do, any arrest that I do whether it's for whatever, is I bring him up, have him stand in front of the main booking area desk and tell the jailers who he is so they can start the paperwork process. I know that he had not been photographed or fingerprinted before we talked to him, but his presence was made known to the jailers.

Q. At that time, did someone search him and take his property from him and –

[46] A. Yeah, in the general context of all that, but, again, whether or not – I know the people who are lodged on narcotic warrants are strip searched as a matter of practice by the jail. Now, whether or not Mr. Fellers was strip searched before we talked to him or after we talked to him and whether all of his property had been removed, I cannot remember.

Q. How long did the jail interview take?

A. I would say approximately a half hour from the time that we read the Miranda form to John until he was turned back over to the jail staff and we left.

Q. And that occurred in an interview room right off to one of the sides of the booking desk?

A. Yes, sir.

Q. Do you remember which room it was?

A. I do not. There's three rooms there.

Q. Was that interview date recorded?

A. It was not.

Q. At that time, were either you or Detective Garnett in possession of a tape recorder?

A. We were not.

Q. And during that jail interview, the same names that you mentioned to him at his house were brought up.

A. Yes. Those are the names of the people that had – brought to the Grand Jury that I had known about [47] who I had interviewed, yes, they were.

Q. And they were brought up in the context of Mr. Fellers' knowledge of them and association with them.

A. At which point, sir?

Q. During the jail interview.

A. Okay. Yes, they were.

Q. And specifically in connection with Mr. Fellers' use and/or distribution of methamphetamine.

A. Yes.

Q. And during your previous testimony, the only names that I gather, weren't mentioned at the house were the names of Valerie Green and Leon Thompson; is that right?

A. No, there were others. Shelly Farfalla.

Q. Okay. He indicated he knew – when you were asking him about Mark Farfalla, he said he knew Mark and his sister Shelly?

A. That is correct.

Q. Okay. But the names that you brought up – you didn't bring up Shelly's name; Mr. Fellers did that.

A. Yes.

Q. The names that you brought up that you didn't mention to him while you were at his house were Valerie Green and Leon Thompson.

A. Yes.

[48] Q. During your interview with him, he never used the word "fronting" money, did he? He said he loaned money.

A. That is correct.

Q. So the word "fronting" were – those were words that you were using here today or using then but those weren't his words.

A. Those were my words that I used then and today, yes.

MR. BRENNAN: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. When did the name Ernie Lawrence first come up?

A. At the jail.

Q. So that was another name that came up there but not at the house?

A. Yes.

Q. (Coughing) Excuse me. Um, when you contacted Mr. Fellers at his home and he invited you in, did you begin to interrogate him regarding his association with narcotics and narcotics trafficking?

A. No.

Q. When Mr. Fellers was seated in his living [49] room, where were you and Detective Garnett standing in relation to him?

A. Where Garnett – or Detective Garnett was standing, I can't specifically remember. I remember standing – Mr. Fellers was seated on the couch. There was a coffee table or some type of table in the living room, and I was on the other side of that table facing Mr. Fellers.

Q. Was Detective Sergeant Garnett standing directly next to Mr. Fellers?

A. No.

Q. Was there a space, then, between you, Detective Sergeant Garnett and Mr. Fellers?

A. Yes.

Q. During the time that you were at Mr. Fellers' house, did he appear to be intoxicated?

A. No.

Q. During the time that you were transporting him and talking to him in the jail, did he appear to be intoxicated?

A. No.

Q. Did you smell any alcohol or anything that would indicate that he had been drinking anything other than a simple non-alcoholic beverage at his home?

A. I smelled no odor of alcoholic beverage and no [50] signs that Mr. Fellers was intoxicated.

MS. LIPOVSKY: I don't have any more questions.

EXAMINATION

BY THE COURT:

Q. Sir, when you arrived at the residence, it's my understanding from your earlier testimony that your first comment to the defendant was that you wanted to discuss his dealings with methamphetamine; is that correct?

A. That is correct, sir.

Q. Your second comment to him was advising him that he was under arrest – or you had a warrant for his arrest?

A. Yes, sir.

Q. All right. And your third comment was that the indictment returned by the Grand Jury had to do with his involvement with certain individuals; is that right?

A. Yes. As I remember it specifically when we entered we asked him the first statement and then the next was just kind of a, you know, a continuation. In fact, I remember – in fact, the Grand Jury returned an indictment for conspiracy to distribute methamphetamine regarding your involvement with the people that I've named: Kathi Kuenning, Pat Sardeson, Mark Farfalla and [51] Thomas Geffs.

Q. All right. When you – in the normal course of your dealings as a narcotics agent, when you arrest someone, do you advise them of the specific background of the charges?

A. In these cases, the federal cases, the lengthy ones, yes, I do. Regarding who it is involved with, yes.

Q. Why is that?

A. Specifically, it's just part of what – the whole speech that I give them.

Q. Is it part of your training to give them that speech?

A. No, not part of my training, sir.

Q. When you mentioned names to the defendant at his home that day, did you expect that he would respond?

A. No. I expected that he – this was a long time ago. This was back in 1998. It had been almost two years prior and that was part of why I said his involvement with these persons. Most of these persons had been incarcerated for a considerable amount of time. And, in fact, people in conspiracy – historical conspiracy cases, when we contact them, you know, they always think that it's something that's happened right now. And it's not. It's things that have happened in the past.

[52] Q. Were you surprised that he made comments in response to your comment?

A. No.

Q. Tell me again, if you will, the persons that you talked about at the jail that had not been talked about at the home.

A. Valerie Green, Leon Thompson and Ernie Lawrence and also Shelly Farfalla.

Q. As I recall your testimony, you also stated that you did not talk about fronting money at the home, but you did talk about it in the jail interview; is that correct?

A. That is correct.

Q. Were there other subjects that you talked about in the jail interview that you did not talk about at the home?

A. Yes.

Q. What were those?

A. Specifically, Mr. Fellers' involvement in the distribution of methamphetamine. And then I specifically made reference using what I knew previously through the case to question him about each specific person that I had mentioned.

Q. Was there some reason, back at the home again, that you did not sit down when he invited you to sit?

[53] A. Yes.

Q. And what was that?

A. Often, we're invited to sit down. For officer safety reasons, I never sit down in a house. That is part of my training. Just never do it.

Q. Is that the only reason?

A. That is the only –

Q. Officer safety?

A. That is the only reason, sir.

Q. Did your training ever concern the psychological effect of talking to someone while you're standing and they're sitting?

A. Yes, I have had training regarding that.

Q. Was that also part of the reason that you didn't sit down?

A. It wasn't, sir.

Q. I take it at the time of the home interview that the defendant was not free to get up and move around at his leisure; is that correct?

A. No, sir.

Q. No, it's not correct –

A. No, this is –

Q. – or no, he wasn't?

A. He wasn't. He wasn't free.

Q. All right. So if he'd done that, you would [54] have restricted his movement; is that right?

A. Yes. There was some things that happened after the fact that – he asked to get his shoes.

Q. Yes.

A. Okay. Yes, that is correct.

Q. All right. I guess I'd better have you amplify on that, the fact that at the conclusion Detective Garnett advised him that it was time to go; is that right?

A. I can't say for sure if it was Detective Garnett or I, but we both came to the understanding that yes, it was

time to go. I can't remember specifically who said, John, it's time to go, let's wrap –

Q. Okay. And so then what happened?

A. He said, can I get my shoes? And Mr. Fellers had been, you know, laid back, cooperative to this point. He had – and I said, sure. He said, my shoes are downstairs. I said, John, you're under arrest. Wherever you go in the house, I need to go also. And while walking down the stairs, I made a – comment, again, for officer safety, you don't have any guns in the house, do you? And that's how it was said. You don't have any guns in the house.

Q. All right. But in any event, the reason that you were with him was because he was under arrest; is [55] that correct?

A. Yes, sir.

Q. All right. That's all the questions that I have.

THE COURT: Are there questions on my questions?

Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Regarding sitting and standing, was Mr. Fellers told he had to sit down?

A. No.

Q. Was he free to stand?

A. Yes, sir – or yes, ma'am.

Q. Whose decision was it that Mr. Fellers sat?

A. That was Mr. Fellers' decision.

Q. And did you place yourself while you were standing in a proximity to Mr. Fellers that would have been close enough to intimidate?

A. No.

Q. When you were standing, was your intent to intimidate Mr. Fellers into talking to you?

A. It was not.

Q. And did your position seem consistent with the [56] training that you had received regarding the psychological impact of standing while talking to a seated person?

A. No.

Q. It wasn't consistent with that?

A. Where I was standing?

Q. Yes.

A. It was not consistent with the training I received regarding the psychological interviewing of subjects.

Q. I want to clarify that, if you can, because I think I asked the question very poorly.

A. Well, basically, what we're taught in situations such as that, and it's not so much specifically that I've been taught about a standing or a sitting suspect. It's when conducting an interrogation of a suspect, the way

that you are seated adjacent to them and that is the – interrogation goes on of slowly moving in in closer proximity to that person as you're interviewing as part of the psychological effects of that. But I maintained my distance from Mr. Fellers when I was standing. I just don't sit down in somebody that's we're going to arrest's house.

Q. Did you change your position while Mr. Fellers was talking about his personal problems and going on [57] about that?

A. I did not.

Q. Did Mr. Fellers' demeanor change in the area, the difference in his relaxed state?

A. No.

Q. And, if I could clarify, when you were answering the judge's questions, the first comment that was made was that you were there regarding his involvement with methamphetamine. And then the way I understood you answered, it was that kind of the fact you had a warrant and who it was about. Was that all one kind of continuous statement or was there a break there? Do you recall?

A. As I recall saying, you know, I came in, I made the statement, John, I'm here to discuss your involvement in the distribution of methamphetamine. In fact, the Grand Jury has returned an indictment regarding with those people that I mentioned. That was just a continuous kind of – or a statement that I made.

Q. And you say here today, "those people that I mentioned." At that point, was it the first time you brought up those names?

A. Yes, that was the first.

Q. And then following that, did you say to Mr. [58] Fellers, you have to answer our questions?

A. No, ma'am.

Q. Did you begin asking him specific questions?

A. No, ma'am.

Q. Did Mr. Fellers just kind of make a comment about that was a long time ago and all these problems?

A. Exactly.

Q. And after that, did you again at the home question him about those people specifically?

A. No, never at the home.

Q. Did Mr. Fellers continue to make statements about his personal problems?

A. He did.

Q. Did any of those things, those statements that he made, have anything to do with those individuals and narcotics trafficking?

A. No.

Q. Other than the one comment about –

A. Other than that he was using at the time period that he was dealing with these people.

Q. While Mr. Fellers was talking to you, was he handcuffed?

A. No.

Q. Physically restrained?

A. No.

[59] Q. Asked questions designed to elicit incriminating responses?

A. No, ma'am.

Q. And when he finally was going to be removed from the home, the restriction on him was simply that he had to have a chaperon, for lack of a better word.

A. When we went down to get his shoes; is that –

Q. Yes.

A. Yes.

Q. And there wasn't any other time when he was physically restrained from going anywhere, was he?

A. No.

MS. LIPOVSKY: I don't have any more questions.

THE COURT: All right. Mr. Brennan.

MR. BRENNAN: Thank you.

FURTHER CROSS-EXAMINATION

BY MR. BRENNAN:

Q. The room that you're in, it's a living room at the house.

A. Yes.

Q. And what are – what's the size of the room, in your estimation in feet?

A. I'm not real good at that. I suppose not quite as big from wall to wall as this – from the jury – [60] from the end of the jury wall to this wall, not that big. I'm not real good at estimating size and feet.

Q. You're saying that it's not as wide or as long?

A. I'm talking as wide, as from the end of the jury box to this wall, it's less wide than that, I think, but pretty close, pretty similar.

Q. Maybe from the far corner of the bailiff's – or the courtroom deputy's desk to where you're sitting?

A. To the end of, where I'm sitting, yes.

Q. Four-and-a-half strides?

MS. LIPOVSKY: Well, I guess I'll object to the form of that question. A stride.

THE COURT: Sustained. Let's go back to feet.

MR. BRENNAN: May I?

THE COURT: Yes.

Q. (By Mr. Brennan) From about where I'm standing here to the corner of the witness stand that you're sitting in?

A. I'd say to this wall.

Q. And you can't tell us approximately how many feet that is?

A. Sir, this is the second time I've been in Mr. Fellers' home. I could not tell you the size of my living room in my home. It's just nothing that I've [61] ever –

Q. He was seated in a chair or on a couch?

A. On a couch.

Q. And there was a coffee table in front of the couch?

A. Yes.

Q. And you were standing on the other side of the coffee table.

A. Yes, sir.

Q. Within a few feet.

A. Yes.

Q. And Detective Garnett was standing beside you.

A. I can't say if he's directly beside me. I, you know, have to ask Detective Garnett exactly where he was standing.

Q. And you were each armed with service weapons.

A. We were.

Q. And you're not trained when you make an arrest to say, "we're here to discuss" or to preface your remarks with that phrase; is that right?

A. That is correct.

Q. But that's what you did in this case.

A. That is.

MR. BRENNAN: That's all.

THE COURT: All right. You may step down.

[62] MS. LIPOVSKY: Your Honor, I have one other question about something that wasn't brought up before that Mr. Brennan asked.

THE COURT: What was that?

MS. LIPOVSKY: About the service weapons.

THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Did you have your service weapons drawn?

A. No.

Q. Were they visible at that time?

A. They were not.

Q. Thank you.

THE COURT: Anything on that?

MR. BRENNAN: No.

THE COURT: All right. You may step down.

MS. LIPOVSKY: I have one other witness. you want me to call him now?

THE COURT: Let's take a quick break. We'll be in recess for ten minutes and resume at the same spot.

* * *

Whereupon, after a ten-minute recess, the following proceedings were had:)

THE COURT: You may call your next witness.

[63] MR. [sic] LIPOVSKY: Thank you. And I forgot to ask, Your Honor, if the other witness could be excused.

MR. BRENNAN: No objection.

THE COURT: All right. Yes, he may.

Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Michael A. Garnett, G-a-r-n-e-t-t.

THE CLERK: Sorry, could you respell the last name.

THE WITNESS: G-a-r-n-e-t-t.

THE CLERK: Please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I do.

THE CLERK: Please have a seat in the witness chair.

THE COURT: Go ahead.

MICHAEL A. GARNETT

having been first duly sworn, testified as follows:

[64] DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. What is your business address?

A. It's 575 South 10th Street now, I believe, Lincoln, Nebraska.

Q. And by whom are you employed?

A. The City of Lincoln for the police department.

Q. And in what capacity are you employed there?

A. I'm a detective sergeant assigned to the narcotics unit.

Q. How long have you been a law enforcement officer?

A. Twenty-six years.

Q. And how long have you worked with the narcotics division?

A. Approximately 18 years.

Q. What are your general duties there?

A. I'm a supervisor of – responsible for the supervision of the plain clothes investigators assigned to the unit which would cover the assignment of cases, assisting those officers in working those cases. I also handle personnel matters that relate to those officers. In addition to that, I conduct investigations and carry a caseload of my own.

Q. Do you review other reports prepared by other [65] officers?

A. Yes, I do.

Q. So you work historical cases on occasion?

A. That's almost all I do, yes.

Q. And were you aware of an investigation concerning John Fellers?

A. Yes, ma'am.

Q. Is John Fellers present in the courtroom today?

A. Yes, he is.

Q. Could you identify him for the Court, please.

A. Yes. He's seated at defense counsel table. He's got on light colored blue jeans and a plaid, tan colored shirt.

MS. LIPOVSKY: I'd ask the record to reflect the witness has identified the defendant.

THE COURT: Yes, it will.

MS. LIPOVSKY: Thank you.

Q. (By Ms. Lipovsky) Detective Garnett, did you have contact with John Fellers on February 24th of the year 2000?

A. Yes, I did.

Q. Where did that contact take place?

A. At his residence in Lincoln, Nebraska.

Q. And is that at 806 Westward Road?

[66] A. Yes.

Q. Who was with you at that time?

A. Deputy Jeff Bliemeister.

Q. Is he also a member of the narcotics task force?

A. Yes, he is.

Q. When you went to the residence on that occasion, were you in uniform or plain clothes?

A. Plain clothes.

Q. Did you and Deputy Bliemeister knock on the door?

A. Yes, we did.

Q. And who answered the door?

A. Mr. Fellers.

Q. Did you and the deputy identify yourself as law enforcement officers?

A. Yes, we did.

Q. How did you do that?

A. I don't recall exactly what Deputy Bliemeister said. I identified myself as Detective Garnett and there was – Deputy Bliemeister had contacted Mr. Fellers on a previous contact and identified himself or said something about, I'm Deputy Bliemeister, do you remember me from before or something, words similar to that effect.

Q. What was Mr. Fellers' reaction?

[67] A. He indicated that he recognized and remembered Deputy Bliemeister.

Q. Did he indicate if he remembered you?

A. Yes, he did.

Q. Had you had previous contact with him?

A. Yes, I had.

Q. And did you recognize Mr. Fellers when you saw him?

A. Yes, I did.

Q. After Mr. Fellers answered the door, what happened?

A. He invited us into the residence. We stepped inside. And at that time Deputy Bliemeister told Mr. Fellers that there were some things that we needed to talk about and went on to explain to Mr. Fellers that an indictment charging Mr. Fellers with conspiracy to deliver methamphetamine had been returned by the Grand Jury. At that time, Deputy Bliemeister also listed off the names of some people – other people who were also involved in that indictment.

Q. At that time, were all of you standing?

A. I believe at that time we were still all standing, yes. There was a –

Q. Did that -

A. I'm sorry.

[68] Q. Did that change?

A. Yes, it did.

Q. How did it change?

A. After we – as we stepped into the entryway into the residence, then that leads right into the living room. At some point in time, Mr. Fellers had a seat on a either a couch or a loveseat that was in the residence.

Q. Was he directed to sit down?

A. No, he was not.

Q. When he sat down, what did he say to you or Deputy Bliemeister about whether you could be seated?

A. I don't – I don't remember that there was any conversation about whether we could have a seat or not. I don't recall if there was or not.

Q. Where did you position yourself in relation to Mr. Fellers?

A. In the – in the close proximity. We were in the living room. Or I guess I would refer to it as a living room, just a few feet away from this couch or loveseat that he was seated on.

Q. Was this position one that you picked for a specific reason?

A. No.

Q. Was it within arm's length distance of Mr. Fellers?

[69] A. No, it was not.

Q. Nearer or farther?

A. It was further away than that.

Q. Okay. During the contact with Mr. Fellers in the living room, did you and Deputy Bliemeister stay in the same positions?

A. Yes, I believe we did. I don't think anybody moved around at all.

Q. Was your position one of – in an attempt to intimidate Mr. Fellers?

A. No, it was not.

Q. After Deputy Bliemeister had listed the individuals that it was reported Mr. Fellers had been involved with, what was Mr. Fellers' response?

A. Mr. Fellers indicated to us that there had been a point in time in his life where there had been some personal problems, problems that involved an ex-wife, problems that involved the business that he owned and during that time Mr. Fellers indicated that he had used methamphetamine during that time.

Q. Did you ask any questions directly of Mr. Fellers during the time you were in the living room?

A. This conversation regarding the personal problems lasted for several minutes and I recall, at least at one point when he was talking about the [70] business, I believe I asked him who his business partner was or something to do with the problems associated with the business.

Q. Did that have anything to do with narcotics trafficking?

A. No, it did not.

Q. And did you ask any questions of Mr. Fellers during this time in the living room that was specifically designed to elicit an incriminating response?

A. No, I did not.

Q. Did you interrogate him regarding the individuals that had been mentioned in narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any other questions?

A. When we were preparing to leave and when we had explained to Mr. Fellers that we needed to leave, there was some conversation regarding he needed to get some shoes.

Q. Between the time that you entered and that conversation, were there other questions you were asking Mr. Fellers?

A. I don't remember any other questions, no.

Q. Was there any information he provided during that time period other than his response about having [71] used methamphetamine that was in relation to the individuals that had been identified for narcotics trafficking?

A. No, there were not.

Q. Mr. Fellers had indicated – well, at some point, Mr. Fellers was advised that the conversation really needed to wrap up; is that a fair assessment?

A. Yes.

Q. And then also at that point there were some steps taken to get him ready to physically leave the room, for example, getting some shoes; is that right?

A. Yes, ma'am, that's correct.

Q. Okay. During the – the time that he was getting his shoes, who accompanied him to do that, do you remember?

A. Both Deputy Bliemeister and I were with Mr. Fellers.

Q. During that time period, did you interrogate about Mr. Fellers about narcotics or drugs?

A. No, ma'am.

Q. Did he make any statements regarding narcotics or drugs during that time period that you recall?

A. Not during that time period.

Q. He was then transported to the jail; is that correct?

[72] A. Yes, ma'am.

Q. And who transported him?

A. Deputy Bliemeister and I.

Q. During that period of transportation, did you ask Mr. Fellers any questions regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any questions regarding the individuals that earlier had been identified?

A. No, we did not.

Q. During that time period, did Mr. Fellers make any statements regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did – during that time period, did Mr. Fellers continue to – to make comments about unrelated things?

A. I don't recall if on the ride from the residence down to the jail if that kind of conversation continued or not. I – that kind of conversation was going on the entire time we were at the house, but I don't remember specifically when we were in the car if it was or not.

Q. When you got to the jail, what area of the jail did you and Deputy Bliemeister take Mr. Fellers?

[73] A. We initially went to the – to the book-in area.

Q. And after that, was there an interview performed of Mr. Fellers?

A. Yes, ma'am, there was.

Q. Where did that take place?

A. In an interview room located off of the book-in area.

Q. Who was present for that interview?

A. Myself and Deputy Bliemeister.

Q. And during the interview, did anyone else enter or leave?

A. No, they did not.

Q. Was Mr. Fellers advised of his Miranda rights?

A. Yes, he was.

Q. Were you present during that?

A. Yes, I was.

Q. Was there a Miranda warning form that was used?

A. Yes, ma'am.

Q. And did you sign that form?

A. Yes, I did.

Q. In front of you is Exhibit Number 1. Do you see that?

A. Yes, I do.

[74] Q. Have you seen that before?

A. Yes, ma'am.

Q. Is that the Miranda form that was used for Mr. Fellers?

A. Yes, it is.

Q. Where does your signature appear?

A. On the lower left towards the bottom under the witness signature line.

Q. During the time that you talked to Mr. Fellers did he ever request to have an attorney present?

A. No, he did not.

Q. Did he ever refuse to make statements to you?

A. No.

Q. Did you ever promise anything to Mr. Fellers in return for him making a statement to you?

A. No, I didn't.

Q. Did you make any promises, direct or implied, to Mr. Fellers that a confession or admission would result in a benefit or advantage to him?

A. No, I did not.

Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?

A. No, ma'am.

Q. And during the interview of Mr. Fellers, was [75] he asked questions by yourself and Deputy Bliemeister?

A. Yes, he was.

Q. Did he appear to understand those questions?

A. Yes, he did.

Q. Did he provide some answers to some of those questions?

A. Yes, ma'am.

Q. Did they seem to be consistent with the questions that were asked?

A. Yes.

Q. Did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?

A. Yes, he did.

Q. And did Mr. Fellers appear to freely and voluntarily waive his right to have an attorney present during questioning?

A. Yes.

Q. During the interview that took place in the jail, do you recall any questions that you asked him?

A. Yes, I do.

Q. What did you ask him?

A. I asked Mr. Fellers some questions about his use of methamphetamine, questions that related to what method he was using to ingest methamphetamine and [76] approximate amounts of how much methamphetamine he was using at the time.

Q. And did he provide you with answers to that?

A. Yes, ma'am, he did.

Q. Did – let me go back to the house for a minute. When you were in the living room and Mr. Fellers was seated, did he have anything to eat or drink?

A. He had a glass or a sports cup of iced tea, I believe.

Q. You said it was iced tea. Do you know there was iced tea?

A. I thought there was some conversation about that at the house. I can't be certain that that's what it was.

Q. During the time that you had contact with Mr. Fellers on that day, did he ever appear to be intoxicated?

A. No, he did not.

Q. Did you ever make any observations regarding what you thought was the use of alcohol?

A. No.

Q. Did you ever smell alcohol on him?

A. No, I did not.

Q. And you said that you had asked Mr. Fellers some questions about his use of methamphetamine and how [77] he used it. Is that something that you would do on a normal interview of this type?

A. Yes, it is.

Q. During the interview with Mr. Fellers, did he provide information regarding Kathi Kuenning?

A. Yes.

Q. Did he provide information regarding drug use or trafficking with some other individuals?

A. All those matters were discussed, yes.

Q. Did he also make some other statements regarding personal problems again?

A. Yes, he did.

Q. At any time during your contact that day with Mr. Fellers, did he ever refuse to answer questions without an attorney present?

A. No, he did not.

Q. Did he ever invoke his right to silence?

A. No, he did not.

Q. Was he ever – did he ever request an attorney and have it denied?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross?

MR. BRENNAN: Thank you.

[78] CROSS-EXAMINATION

BY MR. BRENNAN:

Q. Detective Garnett, did you generate any investigation reports as a result of your contact with Mr. Fellers?

A. No, sir, I did not.

Q. Did you know Mr. Fellers prior to contacting him on February 24, 2000?

A. Yes, sir, I did.

Q. From a previous personal contact?

A. Yes, sir.

Q. At his home?

A. No, sir.

Q. Where did that previous personal contact occur?

A. Well, it was a business contact, if you will. I mean, I believe it occurred at the – it was in 1991, I believe, that it occurred at the Harvester Motel, I think.

Q. You weren't on duty or working at the time of that contact?

A. Yes, I was. That's what I mean. It was a per – it was a business contact.

Q. Oh, okay. So it had to do with police business.

[79.] A. Yes, sir.

Q. Is that the only previous contact you'd had with him?

A. Yes, sir, I believe it is.

Q. Was he working at the Harvester at that time?

A. No, sir.

Q. When you contacted him on February 24th, did you have a tape recorder?

A. No, I did not.

Q. Was there one in the vehicle?

A. Not to my knowledge.

Q. Whose vehicle was it?

A. Deputy Bliemeister's.

Q. When you contacted him, the purpose of the contact was to arrest him on the federal warrant?

A. Yes, sir.

Q. And you had that warrant with you at the time?

A. Yes, sir, I did.

Q. And when you knocked on the door and he answered, the first one to speak was Mr. – was Deputy Bliemeister?

A. Yes, sir.

Q. And Deputy Bliemeister, his initial comment was that you were there to discuss with Mr. Fellers his involvement in the use and distribution of [80] methamphetamine?

A. Words to that effect and – and I don't know the first words he said was, do you remember me or – but those two statements were made almost simultaneously.

Q. Okay. And then Mr. Fellers was told that you had a warrant for his arrest?

A. Mr. – as we stepped inside, Mr. Fellers was told that the Grand Jury had returned an indictment against him. I don't specifically ever remember at that point whether or not a further explanation was afforded that there was an actual warrant for his arrest or not.

Q. But that you told him – or Bliemeister told him that you were there to arrest him.

A. Yeah. Again, I remember specifically the conversation about the indictment charging him with methamphetamine, and I – again, I don't know if the words were ever uttered, I'm here to put you under arrest. I can't tell you that they were, sir, no.

Q. You can't say whether they were or whether they weren't.

A. No, I can't.

Q. But you do remember the comment about the indictment being made by Deputy Bliemeister?

A. Yes, sir.

Q. And that indictment comment was made in [81] connection with certain names by Deputy Bliemeister.

A. That's correct.

Q. Do you remember the names that Deputy Bliemeister said to Mr. Fellers?

A. Some of them, if not all of them.

Q. Tell us the ones that you can remember.

A. Kathi Kuenning, Thomas Geffs, Patrick Sardeson.

Q. Do you remember him saying anything about Mark Farfalla?

A. I don't remember that, but it – Mr. Farfalla was part of that investigation so it's possible that name was mentioned as well.

Q. Do you remember him saying anything about Ernest Lawrence or Leon Thompson?

A. We talked about Ernest Lawrence at the jail, but I don't – I don't remember that name being mentioned at the initial contact.

Q. What about Leon Thompson?

A. I don't remember that name, either, being mentioned.

Q. At the time of the contact with Mr. Fellers he was not free to go, was he?

A. No, sir.

Q. And at the time of the contact with Mr. [82] Fellers, he was not advised of his right to remain silent, was he?

A. No, sir, he was not.

Q. And he was not advised of his right to have the assistance of an attorney during any conversation with him, was he?

A. No, sir.

Q. You, as a police officer for how many? Twenty-six years?

A. Yes, sir.

Q. – have received training in how to conduct an arrest?

A. Yes, sir, I have.

Q. And the training is that when an arrest is made, the arrestee is advised of his right to remain silent and to have an attorney present.

A. No, sir.

Q. That's not your training?

A. Not when we're talking about merely arresting someone, no, sir.

Q. Okay. Are you trained to preface the arrest with the comment that you're here to discuss involvement in the use or distribution of methamphetamine in this type of a case?

A. No, sir, not necessarily.

[83] Q. When you were talking with Mr. Fellers in his residence, he sat down and offered you a seat to discuss whatever you wanted to discuss.

A. I – again, I don't remember that he offered us a seat, but he may – may well have, yes.

Q. And he did take a seat himself and made the statement that he would talk to you about what you wanted to talk about.

A. Yes, sir, there was conversation about that.

Q. And he was, again, told that you were there to discuss his involvement in the use and distribution of methamphetamine.

A. He was – he was told by Deputy Bliemeister that we need to talk to you about this use and the sale of methamphetamine, yes.

Q. And while you were talking to him, you and Deputy Bliemeister were standing a few feet away from him.

A. That's correct.

Q. Were you side by side?

A. We weren't standing exactly side by side, but I'm sure we were in close proximity to one another, yes.

Q. Facing Mr. Fellers.

A. Yes.

Q. And during that conversation, he made [84] statements to you and Deputy Bliemeister in connection

with the names of the people that Deputy Bliemeister said to him when he talked about the federal indictment.

A. No, sir. Deputy Bliemeister said those names at the same time he was explaining about the indictment. That's who brought those names up.

Q. Deputy Bliemeister.

A. Yes.

Q. And Mr. Fellers, in response to that statement by Deputy Bliemeister, talked about using methamphetamine.

A. Yes.

Q. During a period of time in his life when he was associating with those people.

A. He didn't connect the use of the methamphetamine specifically with anyone of those people at that time.

Q. He was talking about them generally.

A. He was talking about his use methamphetamine.

Q. During a particular time in his life.

A. Yes, sir, that's correct.

Q. And it was in connection with personal problems that he had.

A. That's correct, yes, sir.

[85] Q. And then you think that conversation lasted several minutes?

A. I don't – I didn't pay any attention to when it started and when it ended, but we weren't there a great deal of time, no, sir.

Q. Approximately 15 minutes?

A. I would think that that's somewhere in the ballpark, yes, sir.

Q. Do you remember what time you arrived at the jail?

A. Not speci – excuse me, not specifically, no, sir.

Q. How about approximately?

A. It had to be, I'm thinking, between 4:30 and 5 p.m.

Q. In – at the jail did you have a tape recorder?

A. No, sir, we did not.

Q. Did you attempt to get one?

A. No, sir.

Q. In the interview at the jail, could you estimate approximately how long that interview lasted?

A. Oh, to be honest with you, I'd just be guessing if I said.

Q. That's okay with me.

[86] A. I'm going – I'm going to say 30 minutes maybe. Maybe a little bit more, maybe a little bit less. I –

Q. Approximately 30 minutes?

A. I'm going to think somewhere in that area, yes.

Q. And during that interview, Mr. Fellers again made statements to you about the use of methamphetamine at a particular point in time in his life.

A. Yes, sir, he did.

Q. While he was experiencing personal problems.

A. Yes.

Q. And during the interview at the jail, the same names that Deputy Bliemeister mentioned at the home were mentioned by either you or Deputy Bliemeister.

A. Yes, sir. At the jail, he was interviewed about – specifically about those people and his relationship and involvement with those people, yes.

Q. Okay. And his statements to you about those people was also in connection with that time in his life when he was using methamphetamine.

MR. [sic] LIPOVSKY: I'm going to object. That's asked and answered.

THE COURT: (Indiscernible)

A. I'm sorry. Would you state that again, please, sir.

[87] Q. (By Mr. Brennan) The statements that he made at the jail in connection with those people whose names were mentioned -

A. Um-hmm.

Q. – was also about the personal problems that he was having while he was using methamphetamine.

A. Again, he was relating the use of the methamphetamine to the personal problems. We interviewed him

– or attempted to interview him in depth about those particular individuals. If you're asking me was this over the same time period, I would say that yes, it was, at least in part of it.

Q. Okay. After the interview was over, did you tell Mr. Fellers that you would see what you could do to help him?

A. We had a discussion as the interview was ending, and – or as the interview was over, when we ended the interview. We talked about a number of things, and I believe one of the things that we talked about after the interview was over was that we thought Mr. Fellers had information that would be of use to us that had not been provided by Mr. Fellers.

Q. That was a statement you made to him?

A. I'm sure I did, yes.

Q. And that you wanted to work with him or do [88] something to help him?

A. No, sir. That statement – that part, that statement was not made because the interview – Mr. Fellers was told as the interview was over that we felt he was withholding information, that he had not been truthful with us and that we had information very contrary to what he was telling us.

Q. Was he searched by either you or Deputy Bliemeister?

A. At what time, sir?

Q. Either at the residence or at the jail.

A. He was – he would have been searched by us prior to leaving the residence and being transported to the jail. And he would have been searched once again by the jail staff personnel, yes.

Q. When you searched him at the residence, did you seize any evidence from him?

A. No sir.

Q. Do you know whether the jail seized any evidence from him?

A. Not to my knowledge.

MR. BRENNAN: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

[89] Q. At some point after the interview did someone mention the possibility of a proffer interview to Mr. Fellers?

A. Yes, we did.

Q. Was that brought up before or after the interview?

A. That would have been brought up at the end of the interview.

Q. Was he continued to be interviewed after that?

A. No.

Q. Do you remember the conversation at the home when Mr. Fellers responded about that was when I was having personal problems – using meth and I was having personal problems, did Mr. Fellers ever identify specifically people that he had obtained methamphetamine from?

A. No, he did not.

Q. During that – his statements at his home, did he ever identify who he had sold methamphetamine to?

A. No, ma'am.

Q. Did he ever make any statements as to who was involved in his use of methamphetamine while he was at the home?

A. No.

Q. While he was at the home and you were – he was [90] making comments at the home, did he ever specify any information regarding the people whose names had been identified by Deputy Bliemeister?

A. No, he did not.

Q. And while he was at the home, was he specifically asked questions about those individuals?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: You may step down.

MS. LIPOVSKY: Your Honor, may this witness be excused?

MR. BRENNAN: No objection.

THE COURT: All right. Yes, you're excused.

MS. LIPOVSKY: I have no other witnesses.

THE COURT: Evidence for the defense?

MR. BRENNAN: I do not intend to present evidence.

THE COURT: All right. I'll hear your arguments. First, Mr. Brennan.

MR. BRENNAN: It's clear from the evidence that Mr. Fellers was contacted for the purpose of being arrested, contacted by two law enforcement officers. And the first thing that they said to him was, we're here to discuss your involvement in the use and distribution of [91] methamphetamine. In fact, on a previous occasion, Deputy Bliemeister had been there on a – what he couched as knock-and-talk contact. He said the same thing that time: I'm here to discuss your use and involvement – or your involvement in the use and distribution of methamphetamine – or in activity involving methamphetamine.

It's clear that that was the purpose on the previous occasion to get Mr. Fellers to make statements and the purpose of making those comments on February 24, 2000. There really isn't any other reason to say that. They're not trained to say that, that Deputy Bliemeister's practice is to say that when he is arresting someone who has been indicted by a federal grand jury. Both officers testified that they told Mr. Fellers – or that Deputy Bliemeister told Mr. Fellers that he had been indicted by a federal grand jury. Sergeant Garnett wasn't able to specifically recall the names but Deputy Bliemeister seemed to be able to do that. And he said that the names that he told Mr. Fellers that he wanted to discuss with him were Patrick Sardeson,

Thomas Geffs, Kathi Kuenning and Mark Farfalla. And he said that in the same breath as the comment that he made about why he was there. We're here to discuss your involvement in the use and distribution of [92] methamphetamine. We have a federal warrant for your arrest and you've been indicted by a federal grand jury in connection with these people and their activity concerning methamphetamine. If that is not a statement that is designed to elicit a response, then I don't know what one is.

Now, Deputy Bliemeister said that wasn't the reason that he made that statement, but it's clear that any reasonable person would recognize that that statement would probably, most likely, elicit a response from the person that the statement is being made to. And that's what it did. Mr. Fellers sat down on the couch and offered seats to these officers to discuss whatever it was they wanted to talk to him about. And then he began talking about his use of methamphetamine in connection with the statement made to him concerning the people named, Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs. He may not have repeated their names to those deputies – or to the deputy and the sergeant when he was talking to them about his use of methamphetamine, but it's clear in the entire context of the conversation that that's what he was referring to. They gave him names. He refers to a time in his life in responding to those names about when he's having personal problems with his marriage and his business and that [93] that's when he was using methamphetamine.

At that point, he has already acknowledged to these law enforcement officers that he knows what they're talking about, he knows who these people are and he knows that it's in connection with their use of methamphetamine and their

providing it to him for his own use. And to then later on take him to the jail and advise him of his right to remain silent and have an attorney present and then go through within more detail doesn't cure the fact that they have elicited incriminating statements from him at a time when he's not free to go. He's clearly in custody; no one can make a credible argument that he was not in custody at the time that he was being interviewed at the home while he was sitting and they were standing over him.

Then later take him to jail and say okay, now we're going to advise you of your rights. We're going to go through this in greater detail does not cure the illegality of the information obtained. And the – the case I cited to you in my brief – I think it's *Brown v. Illinois* – says that the mere giving of Miranda warnings, and a (indiscernible) waiver obtained thereby doesn't insulate a subsequent interrogation from the exclusionary rule where the information obtained during that subsequent interrogation was merely expanding on or [94] elaborating on the information that was obtained illegally. And it's clear that he was in custody and unadvised and therefore his statements made at the house shouldn't be admissible. And the mere giving of Miranda warnings at the jail doesn't cure the admissibility or the effect on the admissibility of those statements later on at the jail simply because they involve more detail and may involve a couple of more names.

So we would respectfully submit to this Court that whether Deputy Bliemeister admits it or not, it was clear that – it was clearly unnecessary to tell him in a preface to the fact that they were going to arrest him, that they were also there to discuss this with him and that it's clear that the effect of that was to induce him to make incriminating

statements. The law doesn't permit you to obtain incriminating statements from someone without advising them of their rights while they're in custody and then later on advising them of their rights and go through it again even if it happens to be in a little bit more detail.

And so for those reasons, we would respectfully submit that the jailhouse interview is equally inadmissible and I don't think there can be any credible argument that the statements made at the – at the home were not made in custody and in response to [95] questions or a statement designed to elicit a response. And we would ask the Court to sustain the motion to suppress the statements and not permit them to be used at the trial in this case.

THE COURT: Miss Lipovsky?

MS. LIPOVSKY: Thank you, Your Honor.

First off, I don't believe either witness testified that Mr. Fellers was told we have a federal warrant for your arrest. I don't remember either witness –

THE COURT: Bliemeister did.

MS. LIPOVSKY: Bliemeister did? That he said that he had a federal warrant that he told Mr. Fellers that? I believe it was –

THE COURT: In response to my question, he said that.

MS. LIPOVSKY: My recollection of it was that Deputy Bliemeister said they had a federal warrant, but I don't recall the specific words used by him. My understanding and my impression of what he said is that we had – they had a federal warrant for his arrest, not that he

was told. Deputy Bliemeister testified several times what he said, and he said that, we're here – we need to talk about your involvement with methamphetamine. You've been indicted by the Grand Jury regarding your [96] association with Kathi Kuenning, a couple of other people, Patrick Sardeson, Thomas Geffs, and I believe Mark Farfalla.

With the understanding – that's my recollection. But the testimony is I think that there is a question as to whether or not a reasonable person would have believed that they were in custody at that point in time. Later Mr. Fellers was arrested but originally, my understanding of the testimony and Deputy Bliemeister's statement was that, they didn't tell him they had the arrest warrant, they didn't tell him he was arrested at that time. But they did tell him that he – that an indictment had been returned.

And of course, that puts it in a little position than most of the cases that talk about an individual that yes, they're going to arrest him, but they don't tell him at the time that they go to talk to him. So the question is if a reasonable person would have believed they were in custody at the time, independent of what the officers believed, they would have allowed him to leave, to come and go or not. And so I think that there is an argument that at the time they made the initial contact he was not [sic] custody.

But, even if the Court wants to find that he was in custody because there was a warrant that was in [97] existence for Mr. Fellers and he had been told that he had already been indicted, in order to trigger Miranda, you have to interrogate Mr. – you have to interrogate the person.

It is the Government's position that in this particular case the officers were not interrogating Mr. Fellers. They advised him that they would like to talk to him – or that they needed to talk to him about methamphetamine, that there was an indictment and it was regarding these individuals. And after this – making the comment that the indictment's been returned about your trafficking activities or your narcotics activities with Geffs, Kuenning, Sardeson and Farfalla, Mr. Fellers says, oh, you know, that period of time was, you know, I mean, I was using methamphetamine and had all these problems. And he starts talking about all of his personal problems. He's not questioned after that. He isn't asked, well, what were you doing with Kathi Kuenning, what was going on specifically with Pat Sardeson. Mr. Fellers, who's sitting casually in his home, talking, drinking from a mug of iced tea, is talking about his personal problems. And he's not even responding or giving any information that's in relation to drug narcotic trafficking. The only thing he said was that he had used methamphetamine during a period of time when he was having personal [98] problems. And they he [sic] continued to expound upon those personal problems.

The officers let him talk for five to ten minutes and finally said, okay, that's it, we've got to move on, we're going to arrest you, we need to take you down to the station. And that's when the search for the shoes and the other things happened.

After they got to the station, the officers and Mr. Fellers went into the other room. Mr. Fellers had indicated he was willing to talk. They Mirandized him. He willingly waived all of his Miranda rights and then they began to ask him specific questions and he began to give them information.

In *Alstad v. Oregon*, which is at 105 Supreme Court 1285, is a post *Brown* case. It's in 1985. And in that case, the Court is very clear. It says that when a suspect who has once responded to unwarranted and uncoercive questioning, he is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. And that's what you have here. There was no interrogation of Mr. Fellers at his home. The only halfway incriminating statement he made was that he had used methamphetamine during a period of time when he was having personal problems. That was not coercive questioning. In fact, in the Government's [99] position, it wasn't questioning at all. It was merely a response Mr. Fellers had to the statement that he'd been indicted regarding his activities with these people.

Once he was taken into the station, the officers read him his rights. That's recorded in Exhibit 1. He willingly, knowingly, intelligently and voluntarily waived all of those rights. And all the statements he made after that are admissible in this court. (Coughing) Excuse me. That is when he made statements regarding those individuals, statements that he had never made before. He provided information that he had never provided before. He went into details that he'd never provided before. What he said at the station was not a repeat of what he had said in his home. As I said before, and as the officers testified to several time [sic], he didn't say anything that was incriminating about methamphetamine or those individuals other than a simple statement, oh, that's when I was using methamphetamine. I had a lot of problems then, and he starts talking about all of his problems.

So it's the Government's position that all of the statements that Mr. Fellers made are admissible, and in

particular the statements that were made after he waived his Miranda rights and was actually in custody and interrogated by the officers. All of those statements [100] are admissible and the defendant's motion should be denied.

THE COURT: Mr. Brennan, anything else?

MR. BRENNAN: Just briefly, Your Honor. It is my recollection, and I think it's clear, that Deputy Bliemeister did tell and testified before this Court that he told Mr. Fellers that they were there to arrest him and had a federal warrant for his arrest. His testimony was he made the comment about what they were there to discuss, that he then made the comment that there was a federal arrest warrant and that they were there to arrest him and then he made the comment about the indictment and naming the people whose names were brought up in connection with the indictment.

If that's not a clear signal to Mr. Fellers that he is under arrest and not free to go, I don't know what is. There should really be no question about whether he was in custody at the time of the interview in the living room of his home. And unfortunately, we don't have a tape recording of that interview, nor do we have a tape recording of the interview at the jail. That's not Mr. Fellers' fault, but it just seems a little unreasonable to assume that that interview at the home was, with two officers standing there saying nothing, and Mr. Fellers just rambling on for 15 minutes about the [101] personal problems in his life when he was associating with these people while he was using methamphetamine. It is not a reasonable argument to say that they just stood there and listened and didn't say anything to him during that conversation.

It's clear that the initial comment was if not designed to elicit a response, which I think it was, was clearly one that any reasonable person would respond to if the statement was made, and it's clear that it wasn't him just volunteering information but, rather, responding to what was said to him by the arresting officers.

And then later at the jail again, we don't have the benefit of a tape recording, but the law recognizes the psychological effect that it has on a suspect in custody when he's already given information and then later being asked, do you want to now assert your right to remain silent and have an attorney and the futility that everyone would recognize in now making that assertion after the cat's already out of the bag and the person has already given the incriminating information. And that's precisely why the law is – the exclusionary rule does not permit those subsequent statements to be admitted in court if they're merely following up on previously illegally obtained admissions. And with those comments, we would again ask the Court to sustain the [102] motion.

THE COURT: Well, the principal issues before the Court in regard to the motion to suppress are, first of all, whether or not the defendant was in custody at the time of the statements made in his home at the time of his visit by Detective Garnett and Deputy Bliemeister.

The factors that I have to consider in determining whether or not the defendant was in custody at that time are stated in *United States v. Griffin*, 922 F 2nd 1343, which is an Eighth Circuit case in 1990. The first one is whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject – suspect was free to leave or request the officers to do so or

that the suspect was not considered under arrest. Obviously, that's not applicable here.

Second, whether the suspect possessed unrestrained freedom of movement during questioning and Deputy Bliemeister said that he was not free to move around. And that was confirmed by Detective Garnett.

Whether the suspected – excuse me, whether the suspect initiated contact with authorities. He did not. Or voluntarily acquiesced to official requests to respond to questions. The request was an official request to talk. It wasn't to respond to questions explicitly. But implicitly, it was.

[103] Whether strong arm tactics or deceptive stratagems were employed during the questioning, I do not see that there was any strong arm tactic involved at all; however, the use of detective stratagems is another matter. There were no deceptions as such, but when the officers arrived, Detective Bliemeister said that the purpose of their visit was to discuss with the defendant his role in methamphetamine use and distribution. That was not a true statement. Their purpose was to arrest him. In addition, Detective Garnett stated we need to talk with you about your involvement in methamphetamine use or distribution. Again, while that's not altogether untrue, it does not reflect truthfully the purpose of their visit.

The next factor is whether the atmosphere of the questioning was police dominated, and I find that it was police dominated. They had, at that time, arrested him. I find specifically that Deputy Bliemeister did advise him that either he was arrested or they had a warrant for his arrest in the course of his initial contact and comment to the defendant.

The last factor is whether the suspect was placed under arrest at the termination of the questioning. Obviously, he was arrested before that.

One other thing: With regard to the arrest, [104] there was a notable lack of testimony that at the conclusion of their conversation the officers arrested the defendant. Both of them testified that the comment that was made was simply we need to go now, John, and take you to the jail. If they had not previously advised him that he was under arrest or if it were not clear that he was under arrest, then they would have had to have explained that statement and to explicitly arrest him at that time. There was no testimony that they did.

I therefore find that he was under arrest at the time of all of the statements made. He was definitely in custody under the considerations of *Griffin*.

The next question is whether or not he was interrogated. The applicable test is from *Rhode Island v. Innis* (ph). And, as stated by Mr. Brennan, it is whether or not the comment made was designed to elicit a response. I find that it was. First of all, it is telling, I think, that the first statement made was, we need to talk with you – or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a [105] response.

In addition, it was, again, as Mr. Brennan mentioned, unnecessary for him to say what the indictment was all about specifically mentioning individuals which incident – who incidently [sic] are not mentioned in the indictment. I

cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

The next question is since he was not Mirandized and since he was interrogated while he was in custody, how much needs to be suppressed. The defendant states that everything involved in the – in the comments made by the defendant should be suppressed, even those subjects which were repeated at the jail. I must decide whether or not the subjects that were first broached at the home and later discussed in detail at the jail – I guess the issue is whether or not there was something in between to attenuate the primary taint, as the clause goes. There was no evidence in that regard, directly. There was evidence that they took him immediately to the jail; he was booked in. I think I can take judicial notice of the fact that wherever this address is in Lincoln, Nebraska, it's probably no more than 20 minutes away from the jail. So I think that its fair to [106] conclude that this conversation took place approximately a half hour after the officers and the defendant left his home.

He was Mirandized at this time and I also find that he voluntarily agreed to talk with the officers at that time.

Obviously, the subjects that were mentioned for the first time at the jail and the defendant's comments regarding those subjects need not be suppressed. My notes indicate that the individuals Ernie Lawrence, Valerie Green, Leon Thompson, Shelly Farfalla were first mentioned at the jail. Also the subject of the defendant's involvement in distribution of methamphetamine was first

mentioned at the jail. And also the subject of the defendant fronting money for the purchase of methamphetamine was mentioned first at the jail.

With respect to the individuals that were mentioned and the fact that by answering, the defendant acknowledged that he knew those individuals and by stating that at that period of time, he was having personal problems and was using meth, thereby incriminating him and connecting the meth with the individuals, that must be suppressed. And I shall recommend that all of the comments made by the defendant [107] at the home be suppressed as well as any comments regarding those specific individuals elicited at the time of the interview in the jail be suppressed. That would be the three individuals: Kathi Kuenning, Pat Sardeson and Thomas Geffs, otherwise known as Slick.

There's no information by which I can find that the primary taint of the initial interrogation by the officers was removed by any time or any other activity between the time of the initial statement – interrogation and statement and the time of the subsequent interview in the jail.

Therefore, it will be recommended – is recommended to the trial judge pursuant to 28 USC 636b(1)(b) that the motion to suppress be granted in these respects and denied in all other respects. I shall order that at the time the transcript of this hearing is filed that will be deemed the filing of the report and recommendation. I will direct the clerk to notify counsel of that filing and at that time we'll commence the ten-day limitation for filing objections. Either side or both sides may file objections. After they

have been responded to, the matter will go before the trial judge for a decision.

Is there anything else that we should address regarding this case today?

[108] MS. LIPOVSKY: Is this – no.

THE COURT: All right.

MR. BRENNAN: I'm sorry. Did you mention the name Mark Farfalla in – you said three names, and there were actually four names that were mentioned, by Bliemeister at the home and the fourth name was Mark Farfalla.

THE COURT: Let me check my notes on that. I did not write that – that name down as I was taking notes. If, in the transcript, that name is mentioned as having been mentioned at the home for the first time, then my recommendation would include that name as one of the subjects to be suppressed. All right.

If there's nothing else, we'll be in recess.

MR. BRENNAN: Thank you.

(end of proceedings)

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[109] **TRANSCRIBER'S CERTIFICATE**

I hereby certify that the previous pages reflect truly, accurately and completely the recording of this proceeding as transcribed by me to the best of my ability.

In testimony whereof, I have hereunto set my hand this 29th day of April, 2000.

/s/ Karen Mason
Transcriber – Karen Mason

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN J. FELLERS, Defendant.	)	4:00CR3014 ORDER (Filed Apr. 20, 2000)

A hearing on the defendants motion to suppress was held before me this date. At the commencement of the hearing the defendant withdrew that portion of the motion concerning the shotguns and rifles in his residence, the government conceding that they would not be used by the government in this case. The hearing proceeded on the remainder of the motion, pertaining to defendant's statements.

At the conclusion of the hearing I read into the record my findings and recommendation. For the reasons stated from the bench at the conclusion of the hearing,

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Lyle E. Strom, United States Senior District Judge, pursuant to 28 U.S.C. 636(b)(1)(B), that the motion to suppress, filing 13, be GRANTED in the respects noted in my comments on the record, and DENIED in all other respects.

FURTHER, IT HEREBY IS ORDERED:

1. This report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk.

2. When the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties.

3. The parties are notified that any failure to file an objection to this report and recommendation within the time permitted by the local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation.

4. That portion of the motion to suppress, filing 13, which addresses firearms found at the defendant's residence, is deemed withdrawn.

Dated April 20, 2000.

BY THE COURT:

/s/ David L. Piester
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	4:00CR3014
v.	)	MEMORANDUM AND ORDER
JOHN J. FELLERS,	)	
Defendant.	)	

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 21, pp. 102-108), the defendant's objection to the report and recommendation (Filing No. 22), and the government's objection to the magistrate judge's report and recommendation (Filing No. 23). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of defendant's motion, the transcript of the hearing on said motion (Filing No. 21), the magistrate judge's report and recommendation, the objections of the parties, together with their supporting briefs.

The magistrate judge found that the defendant was in custody at the time he made certain statements in his home, that he was not Mirandized and that his statements were in response to statements of the officers which the magistrate judge found to be implicitly questions. The magistrate judge further found that no strong-armed tactics were used, but he did find there was use of deceptive stratagems in that the officers told the defendant the purpose of their visit was to discuss his role in methamphetamine use and distribution when their primary purpose was to arrest him. The magistrate judge concluded that all statements made by the defendant at his

home prior to his being taken to the police station and the reading of his *Miranda* rights and all statements made by the defendant at the police station which referred to or addressed the specific individuals who were identified by the officers at defendant's home prior to his formal arrest and transportation to the police station be suppressed.

The government's motion seeks an order from the Court rejecting the magistrate judge's report and recommendation in its entirety and denying defendant's motion to suppress. The defendant's objections specifically seek a clearer definition of the scope of the magistrate judge's order of suppression. The Court finds that the magistrate judge's recommendation is too broad and that it should be accepted by the Court only to the extent that all comments or statements made by the defendant at his home prior to his being taken to the police station should be suppressed. The Court finds that defendant was properly given his *Miranda* warnings, that he acknowledged he understood them and that he knowingly and voluntarily consented to speak with the officers, and, therefore, statements he made thereafter are admissible to the extent that they are relevant to any of the issues in the case.

DISCUSSION

Briefly, the Court notes that on February 24, 2000, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister, went to the home of John Fellers for the purpose of arresting him (Filing No. 23, p. 7:11-15). They knocked on the door. When defendant responded, they identified themselves and asked if they could come in. The defendant invited the officers in and they all entered the living room of defendant's home.

Shortly thereafter, the defendant sat down on the davenport, invited the officers to sit, but they continued to stand. The evidence reflects that the officers then advised the defendant that they were there to discuss his involvement regarding the distribution of methamphetamine, that they had a federal arrest warrant, and that the Grand Jury had indicted him for conspiracy to distribute methamphetamine.

The officers specifically stated that the indictment was regarding his association with persons such as Kathy Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. The evidence is clear that at that point, Mr. Fellers began offering information regarding personal problems which he had during which he admitted he had been using methamphetamine at the time period he associated with these individuals. Other than the foregoing statements by the officers, no further questions were directed at defendant, nor were any specific questions asked of him regarding his use or distribution of methamphetamine. Subsequently, after about fifteen minutes in the defendant's home, the officers took Mr. Fellers into custody and to the Lancaster County jail where he was booked. The officers testified that after he was booked, they, using a written form, advised him of his rights as required by *Miranda*. They asked each question individually, asking Mr. Fellers to respond either "yes" or "no" to each question. At the conclusion of the reading and advising him of his rights, the defendant and the two officers signed the waiver of *Miranda* rights form (Exhibit No. 1). (See Transcript (Filing No. 21, pp. 16-19)). He thereafter voluntarily gave a statement.

The Court believes that the facts of this case fall squarely within the Supreme Court's holding in *Oregon v.*

Elstad, 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). In the *Elstad* case, the evidence reflected that the officer had an arrest warrant for Mr. Elstad. When he arrived at the Elstad residence, he sat down with the defendant and asked defendant if he was aware of why he and another detective were there to talk to him. The defendant replied: "No." The officer then asked him if he knew a person by the name of Gross, and the defendant responded: "Yes." The defendant further stated he had heard there was a robbery at the Gross house. At that point, the officer said to Mr. Elstad that he felt that Mr. Elstad was involved in that, and Elstad looked up at the officer and replied: "Yes, I was there." Subsequently, Elstad was escorted to the patrol car, taken to the Sheriff's office and booked. He was then given his *Miranda* warnings, which he indicated he understood, and having those rights in mind, he indicated he wished to speak with the officers.

The trial court let in defendant's written confession. However, the Oregon Court of Appeals reversed the conviction, and the Oregon Supreme Court refused to review. The Oregon Court of Appeals held that the failure to give the defendant his *Miranda* warnings at his home tainted his subsequent written confession, and accordingly, the Court should have suppressed the use of that confession as evidence. The United States Supreme Court reversed. The Supreme Court noted that the Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. The Court went on to note that it would be an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, "unaccompanied by any actual coercion or other circumstances, calculated to undermine the suspect's ability

to exercise his free will, so taints the investigatory process" that a subsequent voluntary and informed waiver is ineffective. The Court then noted:

> Though *Miranda* requires the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Supra, at p. 309. The Supreme Court further noted:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. The Court concluded:

> We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by importing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318. In this case, the defendant made a statement at the police station after having been advised of his *Miranda*

rights, and the evidence establishes that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when he gave his statement to the police. The Court finds the unwarned statements of the defendant made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings. The Court will adopt the magistrate judge's findings as they related to the unwarned statements made by defendant at his home but rejects the findings as they relate to the subsequent statement made after he received the *Miranda* warnings.

The Court has reviewed the defendant's objections and finds the foregoing discussion resolves those objections, and they will be denied. The Court will adopt in part and reject in part the magistrate judge's report and recommendation. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge is adopted and rejected in accordance with this memorandum opinion.

2) The unwarned statements made by the defendant at his home prior to his being taken to the Lancaster County Sheriff's Office are suppressed.

3) The statements of the defendant given at the police station after he had received his *Miranda* warnings are admissible.

DATED this 8th day of June, 2000.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	4:00CR3014
Plaintiff,	SUPERSEDING INDICTMENT (21 U.S.C. §846)
v.	JUDGE KOPF
JOHN J. FELLERS,	MAGISTRATE JUDGE PIESTER
Defendant.	

The Grand Jury Charges:

COUNT I

(Filed Sept. 20, 2000)

From an unknown date, but beginning at least as early as July, 1998, and continuing thereafter up to and including at least June 1, 1999, in the District of Nebraska and elsewhere, JOHN J. FELLERS, the defendant herein, did willfully and knowingly combine, conspire, confederate, and agree together with other persons, some known and some unknown to the Grand Jury, to possess with intent to distribute and to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

A TRUE BILL

/s/ Roseanne Weber
Foreperson

/s/ Thomas J. Monaghan
THOMAS J. MONAGHAN
United States Attorney

The United States of America requests that the trial of this case be held in Lincoln, Nebraska, pursuant to the rules of this Court.

/s/ Janice M. Lipovsky
JANICE M. LIPOVSKY
Special Assistant United States Attorney

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 01-2045

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
v.	*	States District Court for
	*	the District of Nebraska
John J. Fellers,	*	
	*	
Appellant.	*	

Submitted: October 16, 2001
Filed: April 8, 2002

Before: WOLLMAN,[1] Chief Judge, LAY, and RILEY, Circuit Judges.

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court[2] for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

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[1] The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

[2] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

I.

On February 24, 2000, two policemen went to Fellers's Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his *Miranda* rights.

The officers then escorted Fellers to jail, where they advised him of his *Miranda* rights. Fellers signed a written *Miranda* waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers's home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers's request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers's past criminal conduct, the district court raised Fellers's criminal history category to III and sentenced him to 151 months' imprisonment.

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.

The voluntariness of a confession is a legal inquiry subject to plenary appellate review. *United States v. Robinson,* 20 F.3d 320, 322 (8th Cir. 1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." *Id.* (citing *Colorado v. Connelly,* 479 U.S. 157, 167 (1986)) (internal citation omitted).

Contrary to Fellers's contention otherwise, we conclude that *Oregon v. Elstad,* 470 U.S. 298 (1985), renders admissible the statements made by Fellers at the jail. In

that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his *Miranda* rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. *Id.* at 300-302. In holding that the statement given at the sheriff's office was admissible, the Court stated:

> It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned [sic] admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309.

Citing *Patterson v. Illinois,* 487 U.S. 285 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not

applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. *See Elstad,* 470 U.S. at 314-15; *Robinson,* 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

III.

Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie,* 257 F.3d 908, 915 (8th Cir. 2001).

Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart,* 122 F.3d 625, 627 (8th Cir. 1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.'" *United States v. Santana,* 150 F.3d 860, 864 (8th Cir. 1998) (quoting *United States v. Carlisle,* 118 F.3d 1271, 1273 (8th Cir. 1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana,* 150 F.3d at 864 (citing *United States v. Anderson,* 78 F.3d 420, 422-23 (8th Cir. 1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This testimony was sufficient to support Fellers's conviction.

Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

> We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

United States v. Zuazo, 243 F.3d 428, 431 (8th Cir. 2001) (citing *Lindhorst v. United States,* 658 F.2d 598, 602 (8th Cir. 1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

IV.

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana,* 150 F.3d at 864 (quoting *United States v. Moss,* 138 F.3d 742, 745 (8th Cir. 1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable to Fellers during the course of the conspiracy was more than 500 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth,* 257 F.3d 871, 878

(8th Cir. 2001), it is "proper for the sentencing judge to then make more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Payne,* 940 F.2d 286, 293 (8th Cir. 1991). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

Fellers challenges district court's denial of his motion for downward departure. So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable, *United States v. Evidente,* 894 F.2d 1000, 1004-05 (8th Cir. 1990), and thus Fellers's challenge fails.

Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." *United States v. Alverez,* 235 F.3d 1086, 1090 (8th Cir. 2000) (quoting *United States v.*

Hale, 1 F.3d 691, 694 (8th Cir. 1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. *Massiah v. United States,* 377 U.S. 201, 205-06 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. *See id.* at 206. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. *See United States v. Henry,* 447 U.S. 264, 270-71 (1980); *Brewer v. Williams,* 430 U.S. 387, 399-401 (1977); *cf. Rhode Island v. Innis,* 446 U.S. 291, 300-02 & 300 n.4 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of *Oregon v. Elstad,* 470 U.S. 298 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret . . . compromises the voluntariness of a subsequent informed waiver." *Id.* at 312. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Office of the Clerk
Supreme Court of the United States
Washington, D. C. 20543-0001

March 10, 2003

John J. Fellers
FCI Pekin; Reg. No. 16253-047
P.O. Box 5000
Pekin, IL 61555-5000

Re: *02-6320 – Fellers v. United States*

Dear Mr. Fellers:

The Court today entered the following order in the above case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

Since you have filed this petition pro se a motion for appointment of counsel will need to be filed in this matter **pursuant to Rule 39** of the Rules of this Court.

Inasmuch as this case will be argued in the **October Term 2003, October Session**, please note that requests for extensions of time to file briefs on the merits are not favored.

If I may be of any assistance, please contact me.

Sincerely,

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Merits Cases Clerk
Phone: 202-479-3032

Enclosures

5

Supreme Court, U.S.
FILED
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No. 02-6320

IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether police officers violated petitioner's Sixth Amendment right to assistance of counsel when, subsequent to petitioner's indictment, the officers deliberately elicited an inculpatory statement from him outside the presence of counsel.

2. Whether a second, related statement given by petitioner in response to police questioning one-half hour after his initial statement, without any intervening consultation with counsel but after the administration of warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should have been suppressed as fruit of the earlier Sixth Amendment violation.

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IN THE

Supreme Court of the United States

No. 02-6320

JOHN J. FELLERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 119-128) is reported at 285 F.3d 721. The order of the district court (J.A. 110-116), the order of the magistrate judge (J.A. 108-109), and the transcript of the oral ruling of the magistrate judge on the motion to suppress (J.A. 101-106) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2002, and a timely petition for rehearing was denied on May 7, 2002. The petition for a writ of certiorari was filed on July 29, 2002, and was granted on March 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to ... the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

1. On February 23, 2000, a federal grand jury in the District of Nebraska returned an indictment charging petitioner with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 846. The conspiracy was alleged to have lasted from approximately July 1998 to June 1999. J.A. 7.

The day following the indictment, Deputy Sheriff Jeff Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael Garnett of the Lincoln Police Department went to petitioner's home in Lincoln, Nebraska to place him under arrest. J.A. 16. After identifying themselves as police officers, Bliemeister and Garnett entered petitioner's home. *Id.* at 16-17. Bliemeister informed petitioner that the officers "were there to discuss his involvement regarding the distribution of methamphetamine," that the grand jury had returned an indictment charging petitioner with conspiracy to distribute methamphetamine, and that the indictment concerned petitioner's association with Kathi Kuenning, Patrick Sardeson, Thomas Geffs, and Mark Farfalla. *Id.* at 18; *see also id.* at 45, 55, 61, 71, 86. As Bliemeister later admitted, he specifically told petitioner that the officers "wanted to discuss his involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with" those four persons. *Id.* at 47; *see also id.* at 46-47. Neither Bliemeister nor Garnett administered the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at petitioner's home. J.A. 46, 85. Petitioner responded to Bliemeister's invitation, telling the officers that he would talk to them. *Id.* at 86. Petitioner then acknowledged that he had used methamphetamine during a time in his life when he had associated with the four named persons. *Id.* at 18-21, 47-48, 73, 105. The police officers' conversation with petitioner lasted approximately fifteen minutes. *Id.* at 49, 87-88.

Bliemeister and Garnett then transported petitioner directly to the Lancaster County jail, a trip that lasted approximately twenty minutes, and placed petitioner in an interrogation room. J.A. 21, 23-24, 49-50. After Bliemeister administered the *Miranda* warnings, petitioner agreed to speak with the officers. *Id.* at 24-27. Bliemeister then questioned petitioner about the same four persons that Bliemeister had brought up during the immediately preceding encounter at petitioner's home—Kuenning, Sardeson, Geffs, and Farfalla. *Id.* at 29-34, 51-52, 89.

Armed with petitioner's prior admissions that he had associated with those persons, Bliemeister began by questioning petitioner about "his involvement with an individual by the name of Thomas Geffs." *Id.* at 29. Having already admitted, in the previous encounter at his home, that he had associated with Geffs, petitioner again acknowledged knowing Geffs. *Id.* In response to additional questioning by Bliemeister, however, petitioner denied that he ever had obtained methamphetamine from Geffs. *Id.* Bliemeister then moved his questioning to Sardeson, Kuenning, and Farfalla, similarly addressing petitioner's relationship with each person one at a time. *Id.* at 29-34. In each case, the officer appears to have asked petitioner whether he knew the person in question, even though petitioner had admitted his association with them just a half-hour earlier. *Id.* at 29-34, 51-52, 89. After reestablishing the fact of petitioner's relationships with Sardeson, Kuenning, and Farfalla, Bliemeister asked additional questions concerning various purported details of petitioner's relationships with each. Petitioner confessed that he had obtained methamphetamine from Kuenning and Sardeson, loaned money to Kuenning, shared methamphetamine with Sardeson, and used methamphetamine with Farfalla. *Id.* at 29-34, 37. Petitioner denied, however, selling methamphetamine. *Id.* at 37-38. Bliemeister additionally asked petitioner

about his involvement with a few persons not broached previously at petitioner's home. *Id.* at 34-35, 37-38, 52.

Finally, Detective Garnett asked petitioner questions about methamphetamine use. J.A. 35-36, 79. Petitioner repeated his earlier admission, made during the encounter at his home, that he had used methamphetamine. In response to further questioning, petitioner also discussed various details of that use. *Id.* at 33, 35-36. At the conclusion of the interview, Deputy Bliemeister reminded petitioner of the charges in the indictment, informed petitioner that he would be arraigned on those charges, and explained that petitioner would either have to pay for counsel or have counsel appointed for him. *Id.* at 38-39.

2. Before trial, petitioner moved to suppress the statements he had made both at his home and at the Lancaster County jail under this Court's decision in *Miranda*. The magistrate judge held a hearing at which both Bliemeister and Garnett testified. Based on that testimony, the magistrate judge found that Bliemeister's statements to petitioner during the encounter at his home were "designed to elicit a response." J.A. 103.

> [I]t is telling, I think, that the first statement made was, we need to talk with you—or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a response.
>
> In addition, it was . . . unnecessary for him to say what the indictment was all about[,] specifically mentioning individuals . . . who incidentally are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

Id. at 103-104. The magistrate also found that only a half-hour had elapsed between the time the officers and petitioner left petitioner's home and the time the officers commenced interrogation at the jailhouse. *Id.* at 104. Based on his findings, the magistrate judge held that, notwithstanding the administration of *Miranda* warnings at the jail, petitioner's jailhouse statement was tainted by the prior, unlawful encounter at his home. *Id.* at 104-105. The magistrate judge accordingly recommended suppression of petitioner's statement at his home as well as his subsequent jailhouse statement to the extent that the latter concerned the same persons discussed previously at petitioner's home (*e.g.*, Kuenning, Sardeson, Geffs, and Farfalla). *Id.* at 104-106.

3. The district court accepted the recommendation to suppress petitioner's statement at his home, and adopted the magistrate judge's findings as they related to that statement. J.A. 111, 115. The district court rejected, however, the magistrate judge's further recommendation that petitioner's jailhouse statement also be suppressed. *Id.* According to the district court, petitioner "made a knowing, intelligent, and voluntary waiver of his *Miranda* rights" before making his jailhouse statement. *Id.* at 115. Based on that fact, but without making any additional findings regarding the extent of any attenuation of the taint from petitioner's first statement, the district court found the jailhouse statement admissible under *Oregon* v. *Elstad*, 470 U.S. 298 (1985). J.A. 114-115. Bliemeister later testified at petitioner's trial, recounting petitioner's jailhouse statement for the jury, and petitioner was convicted of conspiracy to distribute and to possess with intent to distribute methamphetamine.

4. On appeal, petitioner contended that the elicitation by Deputy Bliemeister and Detective Garnett of the inculpatory statement at his home violated the Sixth Amendment, and that his jailhouse statement also should have been suppressed as fruit of that constitutional violation. Petitioner pointed out that, when the officers

confronted him at his home and in the absence of counsel, they well knew that a federal grand jury had already returned an indictment against him. Petitioner further argued that *Elstad* was inapplicable because his case involved a Sixth Amendment violation, and not simply a *Miranda* violation. Pet. C.A. Br. 27, 36-42.

The court of appeals affirmed. The court rejected petitioner's Sixth Amendment claim in a single sentence, holding simply that "the officers did not interrogate Fellers at his home." J.A. 123. The court of appeals further held that because petitioner made his jailhouse statement after having received *Miranda* warnings, the statement was admissible under *Elstad*. J.A. 121-123. Judge Riley concurred, disagreeing with the majority in one respect. In his view, the police officers violated petitioner's Sixth Amendment right to counsel when they confronted petitioner in his home: "Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine." *Id.* at 127. Judge Riley agreed, however, that petitioner's subsequent jailhouse statement was properly admitted because, in his view, violation of petitioner's Sixth Amendment right to counsel should not take the case outside the rationale of *Elstad*. *Id.* at 128.

SUMMARY OF ARGUMENT

I. The police officers violated petitioner's Sixth Amendment right to assistance of counsel by deliberately eliciting a post-indictment, inculpatory statement from him at his home, in the absence of counsel. The court of appeals rejected petitioner's Sixth Amendment argument in a single sentence, holding that the police officers did not "interrogate" petitioner at his home. That holding not only is based on an incorrect legal standard, but also cannot be squared with the factual record. A government officer violates the Sixth Amendment by deliberately eliciting post-indictment incriminating statements from an accused in the absence of counsel. *See, e.g.*, *Massiah* v. *United States*, 377

U.S. 201, 206 (1964). The officer need not affirmatively question a defendant to violate this Sixth Amendment principle. *See, e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977). Specifically, this Court has held that the Sixth Amendment bars government officers from employing tactics they know likely will induce post-indictment incriminating statements from an accused outside the presence of counsel. *See, e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 174 (1985); *United States* v. *Henry*, 447 U.S. 264, 274 (1980). Viewed through the correct legal prism, the officers' conduct at petitioner's home can only be characterized as deliberate elicitation within the meaning of this Court's Sixth Amendment jurisprudence.

II. Because the officers plainly violated petitioner's Sixth Amendment right to assistance of counsel by deliberately eliciting the first inculpatory statement, petitioner's subsequent jailhouse statement also should have been suppressed, as fruit of the prior violation. Evidence derived from a constitutional violation is subject to exclusion. Here, the ability of the police officers to obtain petitioner's jailhouse statement derived from their prior elicitation of a similar and related statement at petitioner's home, in violation of petitioner's Sixth Amendment right to assistance of counsel. This Court has long recognized that a principal reason why a suspect who has made an initial inculpatory statement will make a second such statement is that he believes he has little to lose through further self-incrimination. *See, e.g.*, *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). While the decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), rejected any presumption of Fifth Amendment *compulsion* based on these psychological pressures, the Court has never questioned the real-world effect of an initial confession on a suspect's willingness to make a subsequent inculpatory statement.

The burden is therefore on the government to prove that it had an independent source for petitioner's inculpatory statement, that it inevitably would have obtained that statement absent the prior Sixth Amendment violation, or

that the taint of that violation had sufficiently attenuated to justify admission of petitioner's jailhouse statement. Because the government has never argued either of the first two exceptions, the admission of petitioner's jailhouse statement turns on a taint-attenuation inquiry. That analysis normally encompasses multiple factors—the temporal proximity of the constitutional violation to the discovery of the evidence in question, the presence or absence of meaningful intervening events, and the purpose and flagrancy of the official misconduct. *See, e.g., Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975). Where the derivative evidence in question is an inculpatory statement made by the defendant, courts also consider whether government officers administered the *Miranda* warnings, although the Court has emphasized that this factor cannot be determinative alone. *Id.*

The court of appeals did not examine the taint-attenuation factors. Rather, it held petitioner's jailhouse statement admissible solely on the basis of *Elstad*, where this Court held that the administration of *Miranda* warnings is ordinarily sufficient to render a second confession admissible after an initial confession has been obtained in violation of *Miranda*. *Elstad*, however, does not govern this case. First, *Elstad* was based on the fact that the "primary illegality" at issue—the failure to administer *Miranda* warnings—did not involve a violation of the Constitution. Here, the primary illegality *is* a violation of the Constitution, namely the Sixth Amendment. The Court has made clear, both in *Elstad* and in similar decisions in the Fourth Amendment context, that when a constitutional violation is at issue, evidence derived from that violation is presumptively inadmissible. Second, *Elstad* concerned the Self-Incrimination Clause of the Fifth Amendment. The administration of *Miranda* warnings addresses the central concern of that Clause—that a defendant not be forced to incriminate himself through the introduction of his own compelled, incriminatory statements at trial. The Sixth Amendment, however, protects broader values of trial fairness and integrity of the adversarial system. The mere

provision of *Miranda* warnings *after* the violation of a defendant's Sixth Amendment right to assistance of counsel is insufficient to protect these values.

A proper consideration of all relevant factors here demonstrates that the taint of the initial Sixth Amendment violation had not sufficiently attenuated when petitioner made his jailhouse statement. That statement followed the prior, unconstitutionally obtained statement by only a half-hour, there was no meaningful intervening event, the officers' elicitation of the first statement was plainly unconstitutional, and petitioner never consulted with counsel before making his jailhouse statement. The government therefore cannot, on this record, sustain its burden of proving the admissibility of petitioner's jailhouse statement. Were the mere administration of *Miranda* warnings permitted to serve as a cure-all in contexts like this one, a defendant's right to assistance of counsel in post-indictment encounters with the police would be seriously undermined.

ARGUMENT

I. POLICE OFFICERS VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL BY DELIBERATELY ELICITING A POST-INDICTMENT INCULPATORY STATEMENT FROM HIM AT HIS HOME, IN THE ABSENCE OF COUNSEL.

A. The Sixth Amendment Right To Assistance Of Counsel Applies To Post-Indictment Encounters Between Law Enforcement Officers And Defendants In Which Officers Attempt To Elicit An Inculpatory Statement.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to ... the Assistance of Counsel for his defence." In the United States, criminal prosecutions take place in an adversarial system of justice in which the government is represented by a professional prosecutor. The Sixth Amendment's Counsel Clause

> embodies a realistic recognition of the obvious truth that the average defendant does not have the

> professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious.

Johnson v. *Zerbst*, 304 U.S. 458, 462-63 (1938). By guaranteeing to defendants the skill and knowledge of legal counsel, the Counsel Clause "minimize[s] the imbalance in the adversary system." *United States* v. *Ash*, 413 U.S. 300, 309 (1973). The Sixth Amendment's equalization of the positions of the state and defendant serves a role indisputably "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

The right of the criminal defendant to assistance of counsel extends beyond the formal trial itself to all critical stages of the adversarial process.

> [D]uring perhaps the most critical period of the proceedings against ... defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to [aid of counsel] during that period as at the trial itself.

Powell v. *Alabama*, 287 U.S. 45, 57 (1932); *see also Moulton*, 474 U.S. at 170. It is well settled, therefore, that "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The "attachment" of the right to counsel upon the initiation of judicial criminal proceedings derives both from the text of the Sixth Amendment, *see, e.g., Moore* v. *Illinois*, 434 U.S. 220, 227 (1977), and from its purpose to ensure a properly functioning adversarial system of criminal justice. Once the

state initiates judicial proceedings against a defendant, "the government has committed itself to prosecute, and only then ... the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks and citation omitted).

The Sixth Amendment guarantees to the defendant, in particular, "the right to rely on counsel as a 'medium' between him and the State," at critical pretrial confrontations with the government. *Moulton*, 474 U.S. at 176; *see also Michigan* v. *Harvey*, 494 U.S. 344, 353 (1990). This Court has interpreted that guarantee broadly, in recognition of the fact that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967); *see also Gouveia*, 467 U.S. at 189. Thus, for example, the Court held in *Wade* that a pretrial identification lineup constitutes a critical stage at which a defendant is entitled to counsel. *See* 388 U.S. at 236-37. The Sixth Amendment right to assistance of counsel at critical pretrial stages is important because often it guarantees "effective representation by counsel at the only stage when legal aid and advice would help [the accused]." *Id.* at 225 (internal quotation marks and citations omitted). "The presence of counsel at such critical confrontations," accordingly, "operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Id.* at 227.

Post-indictment, pretrial confrontations at which the government attempts to elicit inculpatory statements from the accused constitute critical pretrial stages for purposes of the Sixth Amendment. *See, e.g., Michigan* v. *Jackson*, 475 U.S. 625, 629-30 (1986); *United States* v. *Henry*, 447 U.S. 264, 269-70 (1980). Thus, almost forty years ago, in *Massiah* v.

United States, 377 U.S. 201, 206 (1964), this Court held that, once a defendant has been indicted, the government may not deliberately elicit incriminating statements from the defendant in the absence of counsel. The Sixth Amendment prohibits the admission at trial of any statement obtained in this manner. *See id.* The Court has repeatedly reaffirmed the important Sixth Amendment principle articulated in *Massiah*. *See, e.g.*, *Kuhlmann* v. *Wilson*, 477 U.S. 436, 457 (1986) ("[O]nce a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents 'deliberately elicit' incriminating statements from him in the absence of his lawyer."); *Moulton*, 474 U.S. at 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."); *Henry*, 447 U.S. at 274; *Brewer*, 430 U.S. at 400-01.

B. The Police Officers In This Case Deliberately Elicited A Post-Indictment Inculpatory Statement From Petitioner Outside The Presence Of Counsel In Violation Of The Sixth Amendment.

Here, Deputy Bliemeister and Detective Garnett went to petitioner's home after the government had initiated formal adversarial proceedings against him through an indictment. During this encounter, the officers obtained an incriminating statement from petitioner in the absence of counsel. The officers did not advise petitioner of his right to assistance of counsel. The court of appeals nevertheless rejected petitioner's claim that the officers violated his rights under the Sixth Amendment, holding simply that "the officers did not *interrogate* Fellers at his home." J.A. 123 (emphasis added). That holding is erroneous.

As an initial matter, to the extent the court of appeals may have used the term "interrogation" as a shorthand to mean that only *affirmative questioning* of petitioner by the officers outside the presence of counsel would have implicated the Sixth Amendment, the court erred as a matter of law. The proper inquiry under the Sixth Amendment is "whether the Government ... interfered with the right to counsel of the accused by '*deliberately eliciting*' incriminating statements." *Henry*, 447 U.S. at 272 (emphasis added); *see also Massiah*, 377 U.S. at 206. This Court has never held that only *affirmative questioning* of an accused will constitute such deliberate elicitation. Indeed, in *Brewer*, the police detective did not ask the defendant *any* questions. Rather, the detective made statements to the defendant regarding the need to locate the body of the murder victim, followed by the admonition, " 'I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.' " 430 U.S. at 393. Nevertheless, the Court found the case indistinguishable from *Massiah* in any meaningful way. "There can be no serious doubt ... that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." *Id.* at 399.

Since *Brewer*, the Court has confirmed that the Sixth Amendment prohibition on deliberate elicitation of inculpatory statements in the absence of counsel extends beyond "interrogation" (or affirmative questioning) by government officers. In *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4 (1980), the Court questioned whether "the term 'interrogation' is even apt in the Sixth Amendment context." Later that same Term, in *Henry*, the Court squarely rejected the government's argument that the Sixth Amendment bars only affirmative interrogation of an accused outside the presence of counsel. *See* 447 U.S. at 271-72 & n.10; *see also Kuhlmann*, 477 U.S. at 458 (noting that in *Henry*, "the informant had not questioned the defendant, ... [but] had 'stimulated' conversations with [him] in order to 'elicit' incriminating information"). The government renewed the affirmative-interrogation argument five years later in *Moulton* and the Court again emphatically rejected it. "[T]he Solicitor General suggests that ... *Brewer* ... modified *Massiah* to require affirmative interrogation by the Government. *That* argument, however, was expressly rejected

when the Solicitor General made it in *Henry*." *Moulton*, 474 U.S. at 175 n.11 (citations omitted).

The Court's decisions make clear that the government violates the Sixth Amendment whenever it "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Henry*, 447 U.S. at 274; *see also Moulton*, 474 U.S. at 174 (same). This principle derives logically from the values and interests the Sixth Amendment is designed to protect. When government agents confront an accused after the parties have become formal adversaries in the criminal justice system, the accused is entitled to look to counsel to protect his interests. Absent an express waiver, the deliberate elicitation of an inculpatory statement from an indicted defendant in the absence of counsel interferes with that defendant's right to assistance of counsel. The fact that an officer ends his sentences with a period, rather than a question mark, makes no difference for purposes of a Sixth Amendment analysis.

Applying the correct standard, there can be no doubt that petitioner's Sixth Amendment right to assistance of counsel was violated during the encounter at his home. By the time Bliemeister and Garnett went to petitioner's home, a federal grand jury already had returned an indictment charging him with conspiracy to distribute methamphetamine and to possess methamphetamine with intent to distribute it. Bliemeister testified that he told petitioner he and his partner were there "to discuss" those charges. Specifically, Bliemeister admitted that he told petitioner the officers "wanted to discuss [petitioner's] involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs." J.A. 47. Garnett confirmed that

> Deputy Bliemeister told Mr. Fellers that there were some things that we needed to talk about and went on to explain to Mr. Fellers that an indictment charging Mr. Fellers with conspiracy to deliver

> methamphetamine had been returned by the Grand Jury. At that time, Deputy Bliemeister also listed off the names of some people—other people who were also involved in that indictment.

Id. at 71. Bliemeister's statements to petitioner surely constitute deliberate elicitation of post-indictment inculpatory statements. At a minimum, an invitation to an indicted defendant to discuss pending charges in the absence of counsel "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Henry*, 447 U.S. at 274.

Three of the five judges who have considered petitioner's case have agreed with this common-sense conclusion, finding that the officers engaged in conduct designed to elicit inculpatory statements from petitioner. The magistrate judge—the only judge to witness the live testimony of Bliemeister and Garnett at the hearing on the motion to suppress—found that Bliemeister's initial statements to petitioner could only have been "designed to elicit a response." J.A. 103. The district court apparently agreed, adopting the magistrate judge's findings with regard to the statement elicited from petitioner at his home. *Id.* at 111, 115. The concurring judge at the court of appeals also agreed, concluding that "[a]lthough the officers ... did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine." *Id.* at 127.

The only two judges who apparently did not agree that the officers violated petitioner's Sixth Amendment right to assistance of counsel employed an incorrect legal standard. Moreover, they offered no reason for effectively setting aside the lower-court factual findings regarding the officers' conduct. The record is undisputed and clear, and it demonstrates that Bliemeister told petitioner that the officers were there to "discuss" his methamphetamine use and distribution. That statement—apart from its form—is indistinguishable from a question addressing the same subject

and certainly created a situation likely to induce an inculpatory statement from petitioner. This Court should find that the officers deliberately elicited inculpatory statements from petitioner in the absence of counsel and thereby violated his Sixth Amendment right to assistance of counsel.

II. PETITIONER'S JAILHOUSE STATEMENT SHOULD HAVE BEEN EXCLUDED FROM HIS TRIAL BECAUSE IT WAS FRUIT OF THE PRIOR SIXTH AMENDMENT VIOLATION.

A. The Derivative-Evidence Rule Requires Exclusion Of Incriminating Statements Derived From A Prior Sixth Amendment Violation.

Under the well-settled derivative-evidence rule (or "fruit of the poisonous tree" doctrine), the violation of a criminal defendant's constitutional rights demands exclusion at trial of more than just the evidence obtained directly through that violation. *All* evidence derived from the constitutional violation is subject to exclusion. *See, e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). Thus, when the government uses unconstitutionally acquired evidence to obtain additional evidence against a defendant, the derivative-evidence rule provides that *all* such evidence must be excluded from the defendant's trial. As this Court explained (with regard to a statutory violation) in *Nardone* v. *United States*, 308 U.S. 338 (1939), "[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." *Id.* at 340 (internal quotation marks omitted).

The Court originally articulated and developed the derivative-evidence rule in cases involving violations of the Fourth Amendment. *See, e.g.*, *Brown* v. *Illinois*, 422 U.S. 590, 604-05 (1975) (suppressing two inculpatory statements); *Wong Sun*, 371 U.S. at 484-88 (suppressing inculpatory

statement and physical evidence). Subsequent decisions have made clear, nonetheless, that the rule is fully applicable to fruits of Sixth Amendment violations as well. In *Wade*, for example, which involved a violation of the respondent's Sixth Amendment right to assistance of counsel at a pretrial identification lineup, the Court held that admissibility of the subsequent *courtroom* identification was governed by the *Wong Sun* exclusion rule. *See Wade*, 388 U.S. at 239-41. The Court explained that "[a] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." *Id.* at 240. Similarly, in *Nix* v. *Williams*, 467 U.S. 431 (1984), which involved a violation of the "deliberate elicitation" principle at issue in this case, the Court analyzed an evidence-exclusion question under the necessary assumption that the traditional *Wong Sun* derivative-evidence rule applies in the Sixth Amendment context. "[T]he 'fruit of the poisonous tree' doctrine has not been limited to cases in which there has been a Fourth Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment as well as of the Fifth Amendment." *Nix*, 467 U.S. at 442 (citing, *e.g.*, *Wade*, 388 U.S. 218).

Indeed, the holding of *Nix*—that there is an inevitable-discovery *exception* to the derivative-evidence rule in the context of Sixth Amendment *Massiah* violations—makes sense only if the derivative-evidence rule would otherwise apply in the absence of such an exception. At issue in *Nix* was whether evidence pertaining to the discovery and condition of a murder victim's body was properly admitted at the defendant's trial, given that the police had discovered the body after deliberately eliciting pertinent, incriminating statements from the defendant in the absence of counsel. *See* 467 U.S. at 434. The Court had held earlier in *Brewer* that the defendant's statements had to be excluded from trial because the government had deliberately elicited them in violation of his Sixth Amendment right to counsel. *See* 430 U.S. at 400-01. *Brewer* left open, however, whether the subsequently discovered evidence should also have been

excluded. *See id.* at 406 n.12. Seven years later, the Court held in *Nix* that the evidence regarding the victim's body was properly admitted because the government inevitably would have discovered it. *See* 467 U.S. at 448-50. The *Nix* decision was significant because the Court had not previously recognized an inevitable-discovery exception to the derivative-evidence rule. *See id.* at 440-41. But if the derivative-evidence rule were not applicable in the Sixth Amendment context, there would have been no need for the Court even to address whether any inevitable-discovery exception should have been recognized.[1]

In the Sixth Amendment context, moreover, the derivative-evidence rule rests on an additional justification not present in the Fourth Amendment context. In Fourth Amendment cases, the rule is based primarily on a deterrence rationale—the same rationale as the Fourth Amendment exclusionary rule itself. Both Fourth Amendment exclusionary rules are "calculated to prevent, not to repair. [Their] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Brown*, 422 U.S. at 599-600 (internal quotation marks and citation omitted); *see also United States* v. *Leon*, 468 U.S. 897, 906, 910-11 (1984). But, as the Court has explained, the subsequent use *at trial* of the fruits of a Fourth Amendment violation does not itself intrude upon any interests protected by that constitutional provision. *See Leon*, 468 U.S. at 906.

The derivative-evidence rule in the Sixth Amendment context is justified, at least in part, by the same deterrence rationale as in the Fourth Amendment context. The exclusion of post-indictment statements deliberately elicited

[1] Since *Nix*, the Court also has recognized that the independent-source exception to the derivative-evidence rule applies in the Sixth Amendment context. *See Murray* v. *United States*, 487 U.S. 533, 537 (1988) (noting that independent-source exception "has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations").

in the absence of counsel—along with any evidence derived from those unconstitutionally obtained statements—plainly deters government officers and prosecutors from interfering with a defendant's right to assistance of counsel in the first instance. Yet the Sixth Amendment derivative-evidence rule is grounded in more than deterrence. It is also based on the recognition that the integrity of the adversary system and a defendant's fair trial rights are impaired by the use at trial of fruits of a Sixth Amendment violation.

The core purpose of the right to assistance of counsel is to assure the defendant a fair trial. *See, e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Defendants are entitled to the assistance of counsel at critical pretrial confrontations with the government in large part because of the trial effect of such encounters—namely, that the "results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' " *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Wade*, 388 U.S. at 224). Thus, the Court held in *Massiah* that the defendant "was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206. The same rationale supports the exclusion of *the fruits* of a Sixth Amendment violation from trial. Like the admission of a statement deliberately elicited in violation of the Sixth Amendment, the use of the fruits of such a violation exploits the defendant's uncounseled status at the pretrial confrontation with the government to his subsequent disadvantage at trial.

B. Petitioner's Jailhouse Statement Derived From The Officers' Prior Violation Of His Sixth Amendment Right To Assistance Of Counsel.

Petitioner's statement at the Lancaster County jail derived from the prior Sixth Amendment violation and therefore should be excluded unless the government can satisfy one of the established exceptions to the derivative-

evidence rule.[2] Here, the same officers that unconstitutionally elicited a first statement from petitioner at his home then—shortly thereafter, and without any meaningful break in the events—obtained another statement from petitioner addressing subjects both identical to and stemming from those covered in the initial statement. After petitioner admitted at his home that he had been a methamphetamine user during a time in his life when he associated with his alleged co-conspirators, the police officers reestablished those admissions at the jailhouse and then proceeded to question petitioner about them in greater detail.

In similar cases, the Court has ruled that, once the defendant establishes that the government acquired evidence in violation of the Constitution, a presumption arises that any substantially similar evidence obtained by the police subsequent to the violation also derives from that violation. The presumption is rebuttable, but the burden falls on the government to show that the subsequently acquired evidence is not linked to the original constitutional violation. For example, in *Wade*, once the respondent demonstrated that the government had violated his Sixth Amendment right to assistance of counsel at a pretrial lineup, this Court placed the burden on the government to disprove the link between the pretrial identification and the subsequent courtroom identification by the same witness. *See* 388 U.S. at 240 & n.31. It is especially appropriate to place the burden on the government to prove an exception to

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[2] There are three exceptions to the derivative-evidence rule: (1) that the government had an independent source for the evidence in question, *see, e.g., Silverthorne Lumber Co.*, 251 U.S. at 392; (2) that the government inevitably would have discovered the evidence through lawful means, *see, e.g., Nix*, 467 U.S. at 444; or (3) that the link between the constitutional violation (or the evidence that is the direct product thereof) and the subsequently discovered evidence has "become so attenuated as to dissipate the taint" of the initial violation, *Nardone*, 308 U.S. at 341. The government bears the burden of persuasion with regard to these exceptions. *See, e.g., Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*); *Nix*, 467 U.S. at 444.

the derivative-evidence rule in a case like petitioner's, where the *same* police officers who committed the original constitutional violation obtained the substantially similar evidence shortly after that violation. This Court has recognized that very point in its prior cases. For example, in *Murray* v. *United States*, 487 U.S. 533 (1988), the Court presumed that evidence initially discovered by police officers during an unconstitutional search would be inadmissible—notwithstanding that the same officers subsequently obtained the evidence pursuant to a valid search warrant—unless the government could satisfy the independent-source exception. *See id.* at 542.

Even without such a presumption, it is clear in this case that petitioner's second statement did derive from the prior violation of his Sixth Amendment rights. Not only did the police officers pursue with petitioner the same subjects covered previously at his home, but petitioner—who had not yet consulted with counsel and therefore lacked knowledge regarding the inadmissibility of his first statement—was likely to believe that any effort to avoid further clarification of his first inculpatory statement would be hopeless. An important reason why an uncounseled defendant who has made an initial inculpatory statement will make an additional such statement is his belief that there is little to be gained, and perhaps much to be lost, from attempting to avoid further self-incrimination. *See, e.g., Darwin* v. *Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part, dissenting in part); *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). Police officers rely on this very psychological truth when interrogating suspects. *See, e.g.*, Arthur S. Aubry, Jr. & Rudolph R. Caputo, Criminal Interrogation 290 (3d ed. 1980) ("[T]here is one rule which ... should be followed consistently in every interrogation conducted. The subject must be motivated to make the first admission, no matter how apparently small or trivial. If this admission is related to the crime and to the subject matter of the interrogation, there is every reason to expect that the first admission will lead to others, and eventually to the full confession.").

To be sure, an accused in these circumstances is not "perpetually disabled" thereafter from making an inculpatory statement that would be admissible in court. *Bayer*, 331 U.S. at 540-41. Sometimes, the particular circumstances will show that the taint of the original government misconduct has attenuated sufficiently to justify admission of the subsequent confession. For example, in *Bayer*, six months passed between the defendant's initial and subsequent confessions. *See id.* at 541. At times, though, no such attenuation is present and the second statement is therefore suppressed under the traditional derivative-evidence rule. *See, e.g., Brown*, 422 U.S. at 605 & n.12 (holding that a second statement "was clearly the result and the fruit of the first" because, in part, the making of the first statement "bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination"); *see also Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979) (same). Where, as here, a second statement follows shortly after the first, common sense dictates that a link exists between the making of a first inculpatory statement and the defendant's willingness to make a subsequent such statement. This Court's cases recognize such a real-world connection. *See Brown*, 422 U.S. at 605 n.12; *Harrison* v. *United States*, 392 U.S. 219, 226 n.14 (1968); *Darwin*, 391 U.S. at 350-51 (Harlan, J.); *Bayer*, 331 U.S. at 540.[3]

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[3] Whether a confession that follows an initial, unlawfully obtained confession must be *excluded* is a separate question from whether (as in this case) a link *exists* between two such inculpatory statements, which requires the government to satisfy one of the established exceptions to the derivative-evidence rule. In decisions like *Bayer*, this Court recognized that a link does exist between a defendant's making of an initial incriminating statement and his willingness to make a subsequent confession, yet the Court simultaneously held that such a link should not always lead to exclusion of the second confession. We rely here on the Court's recognition of the link and address below the separate question concerning the *admissibility* of petitioner's subsequent jailhouse statement under the taint-attenuation exception to the derivative-evidence rule. *See infra*, Part II.C.

In an analogous situation involving multiple confessions where the government unlawfully obtained the first confession, the Court shifted the burden to the government to disprove the link between the defendant's making of the first confession and his subsequent statement. *See Harrison*, 392 U.S. 219. In *Harrison*, the defendant contended that the government's unlawful introduction of an illegally obtained confession at a previous trial was a factor leading him to make a second incriminating statement at that trial. This Court held that in these circumstances, where the government obtained the first statement unlawfully and thus erroneously admitted it at trial, it would be improper to impose upon the defendant the burden of proving that his second statement was impelled by the first:

> [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure a proof that the spring which he released was effective to the exclusion of all others." Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.

Id. at 224-25 (footnotes omitted). So too, in a case like petitioner's, the government "releases the spring" when its agents illegally obtain a first inculpatory statement from the accused and the same agents shortly thereafter confront the accused a second time on the same matters. Having made that first confession, the defendant operates thereafter under the "erroneous impression that he has nothing to lose ... in a ... decision to speak a second or third time." *Darwin*, 391 U.S. at 351 (Harlan, J.). It is therefore especially appropriate, at a minimum, to presume that the second inculpatory statement is in part a product of the first.

Having released the springs of conduct, the government must shoulder the burden of proving an exception to the derivative-evidence rule.

Oregon v. *Elstad*, 470 U.S. 298 (1985), does not hold—or even suggest—that a second confession never may be considered the fruit of a first voluntary confession. *Elstad* did not reject the Court's earlier recognition of the fact that a suspect who has made a first incriminating statement is likely to make another inculpatory statement to authorities thereafter. Rather, *Elstad* held only that a suspect's internal psychological pressures, standing alone, are insufficient as a legal matter to render a subsequent inculpatory statement *involuntary* within the meaning of the Fifth Amendment. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Id.* at 312.[4] There is a vast difference between asking whether the government *coerced* a defendant to confess (the Fifth Amendment question) and inquiring whether government conduct made it more likely that the defendant would repeat or elaborate upon an unconstitutionally obtained confession (the derivative-evidence question). While the Court in *Elstad* did describe the causal connection between that particular defendant's two confessions as "speculative and attenuated," *id.* at 313, nowhere did the Court purport to reject its numerous previous observations that the making of an initial

[4] *See also Elstad*, 470 U.S. at 311 ("[E]ndowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would ... disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions."); *id.* at 314 ("[T]he mere fact that a suspect has made an unwarned admission does not warrant a presumption of *compulsion*." (emphasis added)).

inculpatory statement influences an accused's willingness to make additional such statements.[5]

Petitioner's case therefore falls squarely within the scope of the *Wong Sun* derivative-evidence rule. Accordingly, petitioner's jailhouse statement must be suppressed unless the government can satisfactorily demonstrate an exception to that rule.

C. The Government Has Not Satisfied Its Burden To Prove Attenuation Of Taint.

The government has not argued that it had an independent source for petitioner's jailhouse statement or that it inevitably would have obtained that statement. Rather, the government, like the court of appeals, relied below on this Court's decision in *Elstad* and its holding that the administration of *Miranda* warnings following an uncounseled confession is ordinarily sufficient to render a subsequent statement voluntary and admissible under the Fifth Amendment. *See* Gov't C.A. Br. 19-24; J.A. 121-123, 128. In other words, the government has argued that the administration of *Miranda* warnings removed the taint of the police officers' misconduct in confronting petitioner at his home in the absence of counsel. But as we explain below, the reasoning of *Elstad* cannot be imported wholesale into this context, for this case involves a violation of the Sixth Amendment's Counsel Clause, not a mere failure by the police to observe the requirements of the *Miranda*. For petitioner's subsequent jailhouse statement to be admissible then, the government bears the burden of proving that the taint from the initial violation of petitioner's Sixth Amendment right to assistance of counsel had sufficiently attenuated by the time of his jailhouse statement. *See, e.g.*, *Kaupp*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*) (government bears burden of proving purgation of taint). The government cannot sustain its burden on the present record.

[5] We address below the relevance of *Elstad* to the separate taint-attenuation inquiry. *See infra*, Part II.C.2.

1. The Court's test for the attenuation of taint with regard to an incriminating statement does not turn on the voluntariness of the statement alone.

Under the principles articulated in derivative-evidence cases such as *Wong Sun*, the government must show that "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint' " of the prior constitutional violation. 371 U.S. at 487 (quoting *Nardone*, 308 U.S. at 341). Put another way, the central question is whether the challenged evidence was discovered "by exploitation of [the prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (internal quotation marks and citations omitted). When the challenged derivative evidence is a defendant's incriminating statement, the Court specifically has framed the inquiry as whether that statement was " 'sufficiently an act of free will to purge the primary taint.' " *Brown*, 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486).

"Free will," as used in the Court's derivative-evidence cases, means more than simply constitutional voluntariness (as in the absence of government coercion). To be sure, it is *necessary* that the government prove that a defendant's incriminating statement was made voluntarily for it to be admissible at the defendant's trial. If the statement instead has been coerced in some manner, there is no need to undertake a derivative-evidence inquiry at all. The Fifth Amendment prohibits the admission of the coerced statement. *See, e.g.*, *Dunaway*, 442 U.S. at 217.

While therefore *necessary*, the voluntariness of a defendant's inculpatory statement has never been understood to be *sufficient* to prove attenuation of the taint of a prior constitutional violation. For example, when the government obtains a confession from a defendant following an illegal arrest, this Court's cases

> firmly establish[] that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of an illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment purposes.

Taylor v. *Alabama*, 457 U.S. 687, 690 (1982); *see also Elstad*, 470 U.S. at 306; *Dunaway*, 442 U.S. at 217, 219; *Brown*, 422 U.S. at 604; *Wong Sun*, 371 U.S. at 486 n.12.

Under the Court's derivative-evidence cases, the government must show not just constitutional voluntariness, but also that the defendant's decision to make the inculpatory statement at issue has not been unduly influenced by the government's prior unconstitutional conduct. As the Court explained in *Brown*, "[i]n order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' " 422 U.S. at 602 (quoting *Wong Sun*, 371 U.S. at 486)); *see also Elstad*, 470 U.S. at 306 ("Beyond [voluntariness], the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation."). Thus, a reviewing court must be convinced that the prior constitutional violation did "not play any meaningful part in the witness' willingness" to make an inculpatory statement. *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978).

Because the "free will" necessary to dispel the effect of a constitutional violation requires more than the absence of coercion, this Court held in *Brown* that the administration of *Miranda* warnings—an act intended to ensure that a defendant's subsequent statement to the police is not coerced—will ordinarily be insufficient by itself to purge the taint of a prior Fourth Amendment violation. *See* 422 U.S. at 601-03. In *Brown*, police officers unlawfully arrested the

defendant without probable cause. Approximately one hour after that arrest, the officers warned the defendant of his rights pursuant to *Miranda* and obtained an incriminating statement. Approximately five hours after that, the defendant was again read the *Miranda* warnings and the government obtained another incriminating statement substantially in accord with the first. The Illinois Supreme Court held that the *Miranda* warnings sufficiently purged the taint of the unlawful arrest. *See id.* at 592-97. This Court disagreed and reversed:

> It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

Id. at 603. In fact, the Court concluded, the Illinois Supreme Court's reliance on the *Miranda* warnings would *encourage* exploitation of a Fourth Amendment violation:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'

Id. at 602-03 (citations omitted).

Since *Brown*, and as recently as this Term, the Court has repeatedly reaffirmed that the mere administration of *Miranda* warnings cannot serve as a "cure-all," sufficient alone to purge the taint of a prior constitutional violation. *See Kaupp*, 123 S. Ct. at 1847 ("[W]e held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always ... break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.' " (quoting *Brown*, 422 U.S. at 603)); *Taylor*, 457 U.S. at 690-91 (same); *Dunaway*, 442 U.S. at 216-17. Rather, when determining whether the taint of a prior constitutional violation has sufficiently attenuated to render a statement admissible, courts must also consider the temporal proximity between the constitutional violation and the defendant's incriminating statement, the presence or absence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *See Kaupp*, 123 S. Ct. at 1847; *Taylor*, 457 U.S. at 690; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 603-04. In each of these cases, the Court held that the confessions obtained following illegal arrests should have been excluded from the defendants' trials notwithstanding the intervening administration of *Miranda* warnings. *See Kaupp*, 123 S. Ct. at 1848; *Taylor*, 457 U.S. at 694; *Dunaway*, 442 U.S. at 218-19; *Brown*, 422 U.S. at 604-05.

Evaluation of the taint-attenuation factors also permits a court to determine whether exclusion of a defendant's inculpatory statement is justified under a deterrence rationale. In *United States* v. *Leon*, a Fourth Amendment decision, the Court explained that "the 'dissipation of the taint' concept ... 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.' " 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). When the derivative evidence at issue is an incriminating

statement by the defendant, the deterrence and free-will inquiries are essentially two sides of the same coin. If the constitutional violation meaningfully enhances the government's ability to obtain the statement from the defendant, police officers will have an incentive to engage in the unconstitutional conduct. Exclusion of the statement thus serves a deterrence rationale. *See, e.g., Dunaway*, 442 U.S. at 218 ("When there is a close causal connection between the illegal seizure and the confession, . . . exclusion of the evidence [is] more likely to deter similar police misconduct in the future."). As the Court's decision in *Brown* demonstrates, however, the deterrence rationale is ill-served by a taint-attenuation test turning solely on constitutional voluntariness. *See* 422 U.S. at 602-03. A defendant who confesses voluntarily within the meaning of the Fifth Amendment may nevertheless have been meaningfully influenced in his decision to speak by the unconstitutional conduct preceding that confession. *See id.* at 603.

2. The court of appeals erred by relying on *Elstad*, rather than the traditional factors of taint attenuation, to resolve petitioner's Sixth Amendment argument for exclusion of his jailhouse statement.

Contrary to this Court's derivative-evidence decisions, the court below accorded controlling importance to the provision of the *Miranda* warnings to petitioner and his subsequent waiver of the rights stated therein. To reach this result, the court relied on *Elstad*. *See* J.A. 121 ("Contrary to Fellers' contention otherwise, we conclude that *Oregon* v. *Elstad* renders inadmissible the statements made by Fellers at the jail." (citation omitted)); *id.* at 128 (Riley, J., concurring) ("I do not believe this [Sixth Amendment] violation takes Fellers's case outside the rationale of *Oregon* v. *Elstad*." (citation omitted)).

In *Elstad*, police officers obtained an initial, voluntary confession from the defendant in contravention of the procedures prescribed by *Miranda*, failing to advise defendant of the *Miranda* warnings prior to interrogating him. Shortly thereafter, the police officers provided the warnings to the defendant and obtained a second, voluntary confession. *See* 470 U.S. at 300-02. This Court held that the second incriminating statement did not need to be excluded as fruit of the prior *Miranda* violation, and therefore had been properly admitted at the defendant's trial. *See id.* at 317-18. The court of appeals' reliance on *Elstad* here to find petitioner's jailhouse statement admissible is erroneous for at least two reasons.

a) Petitioner's case, in contrast to *Elstad*, involves a constitutional violation.

An important premise of the *Elstad* decision was that the primary illegality in that case—the *Miranda* violation—was not itself a constitutional violation. As this Court explained in *Elstad*, "[r]espondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." 470 U.S. at 305. But, as this Court continued, "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself [and] may be triggered even in the absence of a Fifth Amendment violation." *Id.* at 306. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1.

For this reason, the Court rejected the defendant's argument at its very root, concluding that the traditional derivative-evidence rule does not apply with its normal breadth where the primary illegality—a simple failure to administer *Miranda* warnings—does not amount to a constitutional violation. As the Court explained, "the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307; *see also id.* at 308 ("Since there was no actual infringement of the suspect's constitutional rights [in *Michigan* v. *Tucker*, 417 U.S. 433 (1974)], the case was not

controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."). In contrast, in prior cases applying the derivative-evidence rule like *Brown* (in the Fourth Amendment context) and *Wade* (in the Sixth Amendment context), the primary illegality had been an actual constitutional violation. As the *Elstad* Court recognized, official misconduct of constitutional magnitude "traditionally mandate[s] a broad application of the 'fruits' doctrine." 470 U.S. at 306.

Finding no basis for application of the traditionally broad fruits doctrine in the *Miranda* context, the *Elstad* Court instead articulated a more narrow exclusion standard for self-incriminating statements obtained following a *Miranda* violation. If the statement initially acquired in violation of *Miranda* is made voluntarily, then the subsequent statement need only be "knowingly and voluntarily made" to be admissible. *Id.* at 309; *see also id.* at 318 ("The relevant inquiry is whether, in fact, the second statement was also voluntarily made."). "The failure of police to administer *Miranda* warnings does not mean that statements received have actually been coerced." *Id.* at 310. Thus, so long as the first statement is voluntary, there is no concern that Fifth Amendment "coercion has carried over into the second confession." *Id.* For this reason, *Elstad* held that courts need not consider the traditional factors relevant to whether a sufficient break has taken place between an initially coerced confession and a subsequent confession, *e.g.*, the temporal proximity of the two statements. *See id.* Rather, *Elstad* holds that if officers carefully administer *Miranda* warnings after an initial *Miranda* violation, but prior to a defendant's subsequent statement, "thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.' " *Id.* at 311 (quoting *Wong Sun*, 371 U.S. at 486).

This Court's decision in *Dickerson* v. *United States*, 530 U.S. 428 (2000), did not retroactively alter the meaning of *Elstad* and convert the *Miranda* violation at issue in that case into a constitutional violation. Indeed, *Dickerson*

specifically addressed *Elstad* and reaffirmed it. *See id.* at 441 (quoting *Elstad*, 470 U.S. at 306, for statement that the " '*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself ' "). *Dickerson* did confirm that the *Miranda* decision "announced a constitutional rule," *id.* at 444, but it never held that a simple failure to administer *Miranda* warnings itself violates the Fifth Amendment. Rather, *Dickerson* clarified that the "constitutional rule" of *Miranda* is one governing the *admissibility at trial* of statements obtained during custodial interrogation: "This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction." *Id.* at 437; *see also id.* at 434-35. As *Dickerson* explained, the *Miranda* rule is constitutionally based notwithstanding the fact that it excludes more than just the involuntary statements covered by the Fifth Amendment Self-Incrimination Clause. *Miranda* was based on a recognition that "the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great *when the confession is offered in the case in chief to prove guilt.*" *Id.* at 442 (citation omitted) (emphasis added). For this reason, the *Miranda* "decision's core ruling"—which *Dickerson* affirmed had constitutional status—was "that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-44.[6]

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[6] The Court's recent decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirms the first basis of the *Elstad* decision—*i.e.*, that no constitutional violation was at issue there. The four-Justice plurality in *Chavez* held that a simple failure to provide *Miranda* warnings does not violate a suspect's Fifth Amendment rights. *See id.* at 2003-04 (plurality opinion). Justice Kennedy, writing on behalf of himself and Justice Stevens, agreed with the plurality on this point. *See id.* at 2013 (Kennedy, J., concurring in part, dissenting in part). The *Chavez* plurality also quoted *Elstad* for the proposition that " '[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.' " *See id.* at 2003 (plurality opinion).

This important premise of the *Elstad* decision—the lack of a primary constitutional violation—is not present in petitioner's case. Here, as we demonstrate in Part I, *supra*, the police officers violated the Constitution when they deliberately elicited a post-indictment, inculpatory statement at petitioner's home in the absence of counsel. Thus, like the Fourth Amendment violation in *Brown*, the primary illegality at issue in petitioner's case "mandate[s] a broad application of the 'fruits' doctrine." *Elstad*, 470 U.S. at 306. In a case like petitioner's, therefore, where government officers violate a defendant's Sixth Amendment right to counsel, the admissibility of a subsequent confession should be adjudicated by considering the factors to which the courts have traditionally looked when determining attenuation under the derivative-evidence rule. That attenuation inquiry is neither limited to nor controlled by the police's administration of the *Miranda* warnings prior to a second confession.

b) Petitioner's case concerns the Sixth Amendment, whereas *Elstad* pertains specifically to the Fifth Amendment.

The court of appeals' reliance on *Elstad* in petitioner's case is also erroneous because the *Elstad* holding is additionally premised on the role *Miranda* warnings play in buttressing the privilege against self-incrimination. *Elstad* does not purport to account for the distinct values of the Sixth Amendment right to assistance of counsel. This distinction is critical, as the Court has noted that each derivative-evidence inquiry should reflect "the distinct policies and interests" of the constitutional right at issue. *Brown*, 422 U.S. at 602. The central concern of the Fifth Amendment is that a defendant not be compelled to incriminate himself through the introduction at trial of his own involuntary statements. *See Elstad*, 470 U.S. at 306-07. When government officers obtain an initial voluntary statement without first providing the *Miranda* warnings, subsequent administration of those warnings ordinarily ensures that any confession provided thereafter is voluntary. *See Elstad*, 470 U.S. at 310-11. In this manner, any potential *Fifth Amendment* taint remaining from the initial *Miranda* violation is purged.

In contrast, when government officers deliberately elicit a post-indictment incriminating statement from a defendant in the absence of counsel, the subsequent administration of *Miranda* warnings does not purge the *Sixth Amendment* taint of the prior encounter. The Sixth Amendment right to assistance of counsel embodies a " 'realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' " and thus "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." *Maine* v. *Moulton*, 474 U.S. 159, 169 (1985) (quoting *Zerbst*, 304 U.S. at 462-63). " 'Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . [The defendant] requires the guiding hand of counsel at every step in the proceedings against him.' " *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)). When police officers deliberately elicit an inculpatory statement from the accused outside the presence of counsel, they deprive the accused of the "guiding hand" guaranteed by the Sixth Amendment at a critical stage.

Once officers obtain an initial statement from an indicted and uncounseled defendant, the pretrial confrontation becomes substantially slanted in favor of the government. The officers should understand what the uncounseled defendant surely does not—that the initial statement is inadmissible at any trial of the defendant. The officers also understand, however, that the defendant's ignorance of his legal rights with respect to the confrontation will leave him with the "erroneous impression that he has nothing to lose . . . in a . . . decision to speak a second or third time." *Darwin* v. *Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part, dissenting in part); *see also*

United States v. *Bayer*, 331 U.S. 532, 540 (1947); *supra*, p.21 (citing description of criminal interrogation practices).

To be sure, a defendant's fear that the "cat is out of the bag" is insufficient to demonstrate *actual coercion* under the Fifth Amendment. Thus, the subsequent administration of *Miranda* warnings can in some circumstances purge the Fifth Amendment taint potentially remaining from an unlawfully obtained initial confession. *See Elstad*, 470 U.S. at 318. But a police officer's provision of *Miranda* warnings does not by itself purge the Sixth Amendment taint from that very officer's earlier, deliberate elicitation of a post-indictment, incriminating statement in the absence of counsel. The *Miranda* warnings merely inform the accused that he need not make further statements without counsel present. The warnings do not remedy the prior Sixth Amendment violation. *Cf. Brown*, 422 U.S. at 601 ("[T]he *Miranda* warnings thus far have not been regarded as a means . . . of remedying . . . violations of Fourth Amendment rights."). The warnings also do not provide a meaningful substitute for the guiding hand of counsel sufficient to ensure that the government's prior circumvention of the accused's Sixth Amendment right has not continued to influence meaningfully the defendant's decision to speak to government officials. And the warnings certainly do not restore "equality in [the] adversary confrontation" by eliminating any possibility "that the accused might be misled by his lack of familiarity with the law." *United States* v. *Ash*, 413 U.S. 300, 317 (1973).

As this Court recognized in *Johnson* v. *Zerbst*,

> [t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

304 U.S. 458, 465 (1938). Extending *Elstad* to the Sixth Amendment context would place determinative reliance on

the defendant's ignorant failure to claim his right to counsel prior to making a second confession in circumstances where the negative consequences of that ignorance have been exacerbated by the government's misconduct in the first instance. For these reasons, the rule of *Elstad*—that administration of the *Miranda* warnings ordinarily should suffice to render a second confession admissible—should have no application in the Sixth Amendment context.[7]

3. The government cannot sustain its burden to prove attenuation of the taint.

This case, then, is governed by the Court's derivative-evidence cases, and the government must demonstrate that the taint from the police officers' violation of petitioner's Sixth Amendment right to counsel sufficiently attenuated by the time of petitioner's jailhouse statement. As we have explained, this Court normally has examined several relevant considerations in undertaking the taint-attenuation inquiry: the temporal proximity of the constitutional violation to the discovery of the derivative evidence in question, the presence or absence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *See, e.g., Kaupp*, 123 S. Ct. at 1847. When the derivative evidence is an inculpatory statement made by the defendant, the Court also considers the observance of *Miranda*, but that fact is not determinative. *See, e.g., id.* Given the "clear force of the evidence" on the

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[7] In *Patterson* v. *Illinois*, 487 U.S. 285, 296 (1988), the Court held that when the police provide *Miranda* warnings to an accused, a subsequent decision by the accused to make a statement ordinarily will be considered a knowing and voluntary waiver of the accused's Sixth Amendment right to assistance of counsel. That holding cannot aid the government here. Petitioner has never contended that his jailhouse statement should be excluded because of a violation of his Sixth Amendment right during his jailhouse meeting with the officers. Rather, petitioner's contention is that the statement must be excluded as evidence derived from the officers' earlier violation of the Sixth Amendment Counsel Clause at his home, *prior* to the officers' provision of *Miranda* warnings.

present record, *id.* at 1848, the government cannot satisfy its burden.

First, the magistrate judge found that only a half-hour passed between the statement deliberately elicited from petitioner in violation of his Sixth Amendment right to assistance of counsel and his subsequent statement at the Lancaster County jail. During this entire period, petitioner remained in the custody of Deputy Bliemeister and Detective Garnett. The exceedingly brief time period in petitioner's case is shorter than past cases where the Court has found the temporal proximity factor to favor exclusion of a subsequent confession. *See, e.g., Taylor* v. *Alabama*, 457 U.S. 687, 691 (1982) (six hours between illegal arrest and confession); *Brown*, 422 U.S. at 604 (less than two hours between illegal arrest and first statement).

Second, no meaningful intervening event took place between the officers' confrontation of petitioner at his home and the subsequent questioning at the jailhouse. *See, e.g., Kaupp*, 123 S. Ct. at 1848; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 604. Of particular importance here, given the Sixth Amendment context, is the fact that petitioner never actually consulted with counsel between the making of the first and second statements. The lingering Sixth Amendment taint in this case was defendant's ignorance of his legal rights, the consequences of which were exacerbated by the government's deliberate elicitation of the statement at petitioner's home. One means of purging this taint would have been for petitioner actually to consult with counsel. No such meeting took place here. There also was no other intervening circumstance (*e.g.*, an arraignment before a judge at which counsel was appointed) that "could possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691; *cf. Brown*, 422 U.S. at 611 (Powell, J., concurring in part) ("would require some demonstrably effective break, . . . such as actual consultation with counsel or . . . presentation before a magistrate," to

attenuate taint of official conduct that is flagrantly abusive of constitutional rights).

The third factor—the purpose and flagrancy of the official misconduct—is of particular importance here. In *Massiah* and subsequent cases, this Court has set forth a clear and easily understood rule. Absent a waiver, police officers may not deliberately elicit post-indictment, inculpatory statements from a defendant in the absence of counsel. Deputy Bliemeister blatantly violated that constitutional rule, telling petitioner that he and his partner wanted to discuss with petitioner the controlled substances charges on which he had been indicted the previous day. As the magistrate judge found, Bliemeister's statements only could have been designed to elicit an inculpatory statement from petitioner. Moreover, there is no question that Bliemeister knew of petitioner's indictment because the officer notified petitioner of its very existence. Petitioner's case presented no unusual complexities at the outer reaches of the *Massiah* jurisprudence such as, for example, a question regarding whether the officers had a good-faith belief that they were merely eliciting statements regarding an offense for which petitioner had not yet been charged. *See, e.g., Texas* v. *Cobb*, 532 U.S. 162 (2001). In short, Bliemeister's conduct constituted nothing less than a total and blatant disregard of this Court's decisions. *See Brown*, 422 U.S. at 605 (concluding that illegal arrest "had a quality of purposefulness" when the "impropriety of the arrest was obvious").

The only factor supporting the government here is the police officers' subsequent administration of *Miranda* warnings prior to the jailhouse interrogation of petitioner. In this respect, the case is similar to the Court's per curiam decision in *Kaupp* earlier this Term. There, the Court explained: "The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that '*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.'" 123 S. Ct. at

1847 (quoting *Brown*, 422 U.S. at 603). On that record, this Court held that the confession at issue must be suppressed barring the identification of some undisclosed evidence on remand. *See id.* at 1848. Indeed, in *Brown*, *Dunaway*, and *Taylor* too, the Court held that confessions were inadmissible despite the administration of *Miranda* warnings. There is no reason that the provision of the warnings to petitioner, especially considering the Sixth Amendment context, should take his case outside the rationale of these decisions.

In sum, it cannot be said that petitioner's second statement was "sufficiently an act of free will to purge the primary taint" of the prior Sixth Amendment violation. *Brown*, 422 U.S. at 602 (internal quotation marks and citations omitted). As this Court's cases recognize, an important reason why a defendant who has made an initial inculpatory statement will make a second such statement is his (often mistaken) belief that he has nothing to lose. In petitioner's case, of course, he had *everything* to lose by making a second statement, given the inadmissibility of his prior statement. Counsel could have advised him of the consequences of repeating or elaborating upon that statement. By deliberately eliciting the initial incriminating statement in the absence of counsel and then interrogating petitioner at the jail, the police officers exploited the very condition the Sixth Amendment right to counsel is meant to address. Ignorant of his legal rights, petitioner was considerably more likely to make the jailhouse statement. This taint was not eliminated by the passage of "substantial time," by " 'any meaningful intervening event,' " or by the nature of the prior violation. *Kaupp*, 123 S. Ct. at 1848 (citation omitted).

Moreover, to the extent the taint inquiry " 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost,' " *Leon*, 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J.)), exclusion is amply justified here. If police

officers were permitted to cure such a clear violation of a defendant's Sixth Amendment rights as in the circumstances of petitioner's case simply by administering the *Miranda* warnings soon after the violation, the police would no doubt quickly discover how to circumvent the constitutional principles at issue here. Any incentive on the part of the police to avoid violation of the Sixth Amendment "would be eviscerated by making the warnings ... a 'cure-all.' " *Brown*, 422 U.S. at 602 (holding same in Fourth Amendment context). For these reasons, the Court should hold that petitioner's jailhouse statement must be suppressed as fruit of the prior Sixth Amendment violation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 02-6320

In the Supreme Court of the United States

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the interaction between police officers and petitioner after his indictment, in which petitioner made a voluntary statement without having received the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), rendered his subsequent statements inadmissible under the Sixth Amendment.

2. Whether statements that petitioner made after receiving and voluntarily waiving his *Miranda* rights should have been suppressed as the fruits of his initial interaction with the police.

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In the Supreme Court of the United States

No. 02-6320

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 119-128) is reported at 285 F.3d 721. The order of the district court (J.A. 110-116) adopting in part and rejecting in part the report and recommendation of the magistrate judge (J.A. 108-109) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2002. A petition for rehearing was denied on May 7, 2002. Pet. App. 1. The petition for a writ of certiorari was filed on July 29, 2002 and was granted on March 10, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months of imprisonment, to be followed by a four-year term of supervised release. J.A. 3. The court of appeals affirmed. J.A. 119-128.

1. On February 23, 2000, a federal grand jury returned a one-count indictment charging petitioner with conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute it, in violation of 21 U.S.C. 846. J.A. 7-8. The next day, Deputy Sheriff Jeffrey Bliemeister of the Lancaster County Sheriff's Office and Detective Sergeant Michael A. Garnett of the Lincoln Police Department, who were members of the Lincoln/Lancaster County Drug Task Force working in cooperation with federal authorities, went to petitioner's house to arrest him. J.A. 15-16, 70. Both Bliemeister and Garnett had met petitioner previously; Bliemeister had met petitioner in 1995 while doing volunteer

work at a hospital, and had interviewed petitioner in 1999 about a citizen tip that he was involved in drug dealing. J.A. 15. Garnett had interviewed him in 1991. J.A. 81-82. When they arrived at the house, the officers (who were in plain clothes) identified themselves, and petitioner invited them inside. J.A. 17, 70-71.

Once inside, Deputy Bliemeister told petitioner, "John, I'm here to discuss your involvement in the distribution of methamphetamine." J.A. 61. In one "continuous * * * statement," *ibid.*, Bliemeister then told petitioner that a grand jury had indicted him for conspiring to distribute methamphetamine; that Bliemeister had a federal warrant for petitioner's arrest; and that the indictment concerned petitioner's alleged involvement with persons such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. J.A. 18, 61, 86, 112. Petitioner stated that "at that point in his life * * * he had a lot of personal problems," J.A. 18, and explained that he had been having business problems with a former business partner and was going through a divorce. J.A. 18, 62, 69. Although petitioner mentioned among his "personal problems" the fact that he had used methamphetamine, he did not mention methamphetamine distribution. Petitioner acknowledged that he knew at least some of the people Bliemeister had mentioned but did not connect them with drug distribution. See J.A. 47, 87. During the visit, the officers asked petitioner no questions about narcotics or about the pending charges. J.A. 18-19, 22, 62, 75-76. After about five to ten minutes, J.A. 20, the officers interrupted petitioner's monologue to tell him they needed to transport him to the county jail. J.A. 21. After petitioner retrieved his shoes from the basement, the officers took petitioner to the Lancaster County Jail.[1]

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[1] While accompanying petitioner to get his shoes, Deputy Bliemeister asked petitioner, for officer safety reasons, whether there were any

During the approximately 20-minute ride, J.A. 49-50, 104, the officers asked petitioner no questions, but petitioner spoke unprompted about personal matters, including a land deal that had gone badly for him. J.A. 23.

After arriving at jail, Bliemeister and Garnett fingerprinted, photographed, and booked petitioner. The officers then advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his rights and signed a written waiver-of-rights form. See J.A. 9, 23-26. During a half-hour interview with Bliemeister and Garnett, J.A. 51, petitioner stated that he had purchased "user quantities" of methamphetamine from Kuenning and Sardeson and had used the drug, J.A. 29, 30, 33, 35, stated that he had provided money to Kuenning, J.A. 31-32, and stated that he had introduced Kuenning to Mark Farfalla. J.A. 32-33. Petitioner denied distributing or selling methamphetamine, J.A. 37-38, and denied buying methamphetamine from Sardeson or Kuenning in quantities sufficient for resale. J.A. 30. Petitioner also said that he had loaned money to Kuenning to permit her to pay her cell phone bill and to allow her to post bond after being arrested, but had not given her money to permit her to buy methamphetamine. J.A. 31, 34. Petitioner denied that he had introduced Kuenning to Farfalla in order to provide her with a drug source, J.A. 33, and denied selling methamphetamine to Sardeson. J.A. 37. Although petitioner said that he knew Geffs, he denied purchasing methamphetamine from him. J.A. 29. Petitioner denied purchasing methamphetamine from Val Green, J.A. 34-35, and

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firearms in the basement. J.A. 59. When petitioner responded that he had three shotguns and a rifle in the house and showed them to the officers, they seized the firearms. Although petitioner, as a convicted felon, was prohibited from owning firearms, the officers told petitioner that he would not be booked for unlawful possession of the firearms, and no such charges were brought against him. See J.A. 22, 34, 59.

was evasive about whether he had purchased supplies of the drug from Farfalla. J.A. 32-33, 35. Petitioner said that he knew individuals named Leon Thompson and Ernie Lawrence and admitted sharing methamphetamine with Thompson, but denied selling the drug to either of them. J.A. 37-39.

2. Before trial, petitioner moved to suppress the statements that he made to Bliemeister and Garnett. Petitioner argued that he "was in custody when he was contacted by" the officers at his house, and he did not make a "voluntary, knowing and intelligent waiver of his rights to remain silent and to the assistance of counsel" because he had not been informed "that he did not have to answer questions and was entitled to an attorney." Br. in Supp. of Defendant's Mot. to Suppress at 3. The district judge submitted the motion to a magistrate judge for consideration. J.A. 1.

The magistrate judge recommended that the statements that petitioner made at his house be suppressed, concluding that the officers had obtained them through custodial interrogation without advising petitioner of his *Miranda* rights. J.A. 103, 108. The magistrate judge reasoned that Deputy Bliemeister's initial statement that he had come to petitioner's house to "discuss" petitioner's involvement in methamphetamine distribution and his description of the charges against petitioner constituted interrogation under *Miranda* because those words were "designed to elicit a response." J.A. 103 (citing *Rhode Island* v. *Innis*, 446 U.S. 291 (1980)). The magistrate judge further recommended that the portions of petitioner's jailhouse statement that involved individuals the officers had mentioned at petitioner's house (*i.e.*, Kuenning, Sardeson, Geffs, and Farfalla) should be suppressed as the fruit of the prior unwarned interrogation, J.A. 104-105, because "the primary taint of the initial interrogation by the officers was [not] removed * * * between the time of the initial * * * interrogation and statement and the time of the subsequent interview in the

jail." J.A. 105. The magistrate judge concluded, however, that petitioner's statements during the jailhouse interview relating to the "distribution of methamphetamine" and "the subject of [petitioner] fronting money for the purchase of methamphetamine" "[o]bviously * * * need not be suppressed," J.A. 104-105, because those subjects were raised for the first time at the jailhouse after petitioner had received *Miranda* warnings. Both parties filed objections to the magistrate judge's recommendation. See Br. in Supp. of Defendant's Objection to Report and Recommendation 3.

3. The district court suppressed the statements that petitioner made at his house. J.A. 115. The court adopted the recommendation of the magistrate judge that petitioner was in custody at the time of those statements and that the statements were made in response to remarks from the officers that were "implicitly questions." See J.A. 110, 115. The court declined, however, to suppress petitioner's statements made at the jail. The court reasoned that, because petitioner voluntarily made the jailhouse statements following waiver of his *Miranda* rights, "the facts of this case fall squarely within the Supreme Court's holding in *Oregon* v. *Elstad*, 470 U.S. 298 (1985)," J.A. 112-113 (parallel citations omitted), which held that, though *Miranda* requires that an unwarned statement be suppressed, the admissibility of any subsequent statement made after administration of warnings turns solely on whether it is knowingly and voluntarily made. J.A. 114 (citing *Elstad*, 470 U.S. at 309). The district court concluded that "the unwarned statements of [petitioner] made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings." J.A. 115.

4. The court of appeals affirmed. For the first time on appeal, petitioner explicitly claimed that not only had his rights under *Miranda* been violated, but his Sixth Amendment right to counsel had been violated as well. See Pet.

C.A. Br. 36; see also *id.* at 39 ("Neither the magistrate [judge] nor the [district] judge considered whether [petitioner's] Sixth Amendment right to counsel was violated."). The court of appeals rejected that claim, holding that the statements were admissible under *Oregon* v. *Elstad*. J.A. 121-122. The court found that the record "amply support[ed]" the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. J.A. 123.

The court of appeals also rejected petitioner's argument that, under *Patterson* v. *Illinois*, 487 U.S. 285 (1988), "the officers' failure to administer the *Miranda* warnings at his home violated his [S]ixth [A]mendment right to counsel inasmuch as the encounter constituted a post-indictment interview." J.A. 122. The court of appeals found *Patterson* "not applicable" because "the officers did not interrogate [petitioner] at his home." J.A. 122-123.

In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers violated petitioner's Sixth Amendment right to counsel by "deliberately elicit[ing]" incriminating information from him without counsel present after the indictment had been returned. J.A. 127. Judge Riley stated, however, that the police conduct with respect to petitioner's initial statement did not require suppression of petitioner's subsequent statement. Judge Riley reasoned that, under the rationale of *Elstad*, the second statement was admissible in light of petitioner's knowing and voluntary waiver of his right to counsel before questioning. J.A. 128.

SUMMARY OF ARGUMENT

I. This Court has interpreted the Sixth Amendment to render inadmissible in the government's case in chief information that government agents deliberately elicit from the accused after his indictment unless he was first advised

of his right to the assistance of counsel and made a voluntary decision whether to exercise that right. In this case, the government did not deliberately elicit statements from petitioner at the time of his arrest so as to raise any Sixth Amendment issue. The officers did not ask petitioner questions, or encourage him to reveal incriminating information. Rather, the officers simply informed petitioner, in a single continuous statement, that they were there "to discuss" his involvement in methamphetamine distribution, that he had been indicted for conspiring to distribute methamphetamine, that the officers had an arrest warrant, and that the charges concerned petitioner's involvement with certain individuals. Courts have long held that informing a person of the charges that support his arrest is not an interrogation tactic or its equivalent, but is routine police practice that is consistent with the Federal Rules of Criminal Procedure. Deputy Bliemeister testified without contradiction that he did not "expect" petitioner to respond. The officers' conduct did not constitute the sort of deliberate attempt to obtain information that the officials "must have known" would elicit a response or would be "likely" to do so. *United States* v. *Henry*, 447 U.S. 264, 271, 274 (1980). Accordingly, there is no "poisonous tree" to support petitioner's argument that his second statement—made after he indisputably received *Miranda* warnings and validly waived his right to counsel—should be discarded as tainted fruit.

II. Even if the officers' conduct at petitioner's house were viewed as deliberate elicitation of information from an accused who had not been advised of his right to counsel, the Sixth Amendment does not require that petitioner's later statements at the jailhouse be suppressed, on the theory that they were the fruit of the poisonous tree. Petitioner's voluntary, knowing, and intelligent waiver of his right to counsel before speaking with the officers at the jailhouse is

sufficient to ensure that petitioner's decision to make the statements was an act of free will.

This Court confronted an analogous issue under the Fifth Amendment in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). In *Elstad*, the Court held that when officers obtain a voluntary statement from a suspect without having administered *Miranda* warnings, and later obtain a second statement after having administered *Miranda* warnings, the second statement is admissible if it was knowing and voluntary. *Elstad*'s analysis is equally applicable in the closely related Sixth Amendment context. In both contexts, the administration of *Miranda* warnings cures the condition that renders the initial, unwarned statement inadmissible. The defendant, with full awareness of his rights, is free to make a voluntary election to speak with officials on his own, and his statements can be received in evidence consistent with the Sixth Amendment.

Petitioner contends that the rationale of *Elstad* is inapplicable because the deliberate elicitation of statements from an unwarned accused, unlike the failure to provide *Miranda* warnings to an unindicted suspect, involves a constitutional violation at the time of the police conduct. That claim is unfounded. The Sixth Amendment rule on which petitioner relies is that a defendant's statement, deliberately elicited without a valid waiver of counsel, "c[an] not constitutionally be used by the prosecution as evidence against *him* at his trial." *Massiah* v. *United States*, 377 U.S. 201, 207 (1964). The Sixth Amendment "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). Accordingly, as Justice Stevens has observed, "[t]he Sixth Amendment right to counsel * * * is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. It is

thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting) (citations and internal quotation marks omitted).

Even if there were a Sixth Amendment violation at the time the initial statements were made, petitioner's receipt of *Miranda* warnings and his waiver of rights before making his second statement at the jailhouse justifies their admission. The warnings and petitioner's valid waiver were the antidote for any Sixth Amendment concern raised by the initial encounter. Petitioner argues that the second statement must be regarded as the fruit of the first, because the first statement let "the cat out of the bag" and exerted psychological pressure on petitioner to waive his rights and give a second statement. This Court in *Elstad* rejected the same argument. The Court explained that "the causal connection between any psychological disadvantage created by [an initial] admission and [an] ultimate decision to cooperate is speculative and attenuated at best." 470 U.S. at 313-314. That reasoning applies here as well: speculation about the accused's motives for speaking to officers provides no justification for importing a multi-factor attenuation-of-the-taint analysis into the Sixth Amendment law of confessions. Nor is there any justification for applying Fourth Amendment precedents, or Sixth Amendment precedents dealing with evidence other than confessions, to this setting, when *Elstad* provides the most applicable precedent.

Finally, the cost of suppressing a voluntary confession, given after a valid waiver of the right to counsel, outweighs any benefit to the protection of Sixth Amendment rights. The exclusion of reliable evidence of guilt in the form of the defendant's voluntary statements impairs the truthseeking function of a criminal trial. And Sixth Amendment interests

are adequately protected by excluding the statement that preceded the accused's waiver of his rights.

III. Even if a multi-factor attenuation-of-the-taint analysis were to be applied, on this record, petitioner's jailhouse statements should be admitted. The conduct of the officers at petitioner's house was, at most, a mild form of deliberate elicitation; no explicit interrogation ensued; and nothing was said or done to encourage petitioner to keep talking. In addition, petitioner's initial statement did not let "the cat out of the bag." He spoke of using methamphetamine, not distributing it, and at most acknowledged some association with some of the individuals allegedly involved in the conspiracy. Finally, the thorough and complete administration of *Miranda* warnings gave petitioner the information needed to make an independent decision whether to answer questions without counsel. Based on all of the relevant factors, his decision to proceed alone was "an act of free will [sufficient] to purge [any] primary taint." *Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (per curiam) (second bracketed word added) (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)).

ARGUMENT

THE ADMISSION OF PETITIONER'S SECOND STATEMENT, MADE AFTER A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL, DID NOT VIOLATE THE SIXTH AMENDMENT

In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court has held that, once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements "deliberately elicited" from an accused without a valid waiver of the right to counsel. See, *e.g.*, *Michigan* v. *Harvey*, 494 U.S. 344, 348 (1990); *Kuhlmann* v. *Wilson*, 477 U.S. 436,

457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977). The rule recognizes that, with the shifting of the government's role from investigation to accusation, "the assistance of one versed in the 'intricacies . . . of law' * * * is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)). The exclusion of statements obtained in the absence of a valid waiver of counsel thus serves to protect "the integrity or fairness of [the] criminal trial." *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

For deliberately elicited, uncounseled post-indictment statements to be admissible at trial, the prosecution must establish that the accused voluntarily, knowingly, and intelligently relinquished his Sixth Amendment right to counsel. See, *e.g.*, *Harvey*, 494 U.S. at 348-349. The Court has held that "when a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda* v. *Arizona*, [384 U.S. 436 (1966)], that will generally suffice to establish a knowing and intelligent waiver * * * for purposes of postindictment questioning." *Harvey*, 494 U.S. at 349; *Patterson* v. *Illinois*, 487 U.S. 285, 296-298 (1988).

In this case, the officers advised petitioner at the jailhouse of his *Miranda* rights, including his right to consult with an attorney, and he voluntarily waived those rights both orally and in writing. See J.A. 104. Petitioner nevertheless claims that his subsequent statements should have been suppressed, arguing that the officers "deliberately elicited" his initial statements at his house without obtaining a valid waiver of counsel (Br. 12-16), that fruit-of-the-poisonous-tree analysis applies (Br. 16-25), and that his later statements at

the jail were the tainted fruit of earlier misconduct (Br. 25-41). Each element of that claim is without merit.

I. The Police Officers Did Not Deliberately Elicit The Statements That Petitioner Made At His House

The Sixth Amendment is not violated simply because the government uses at trial "incriminating statements from the accused [given] after the right to counsel has attached." *Moulton*, 474 U.S. at 176 (citing *Henry*, 447 U.S. at 276 (Powell, J., concurring)). A defendant who volunteers statements after indictment cannot invoke the Sixth Amendment to exclude them. See *Henry*, 447 U.S. at 276 (Powell, J., concurring) ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action"). Rather, to exclude statements on the ground that the right to counsel had attached and was not waived, the accused must show that law enforcement officers "took some action * * * that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459.

Deliberate elicitation includes both affirmative questioning and statements or conduct that officials "must have known," *Henry*, 447 U.S. at 271, would induce the accused to incriminate himself or that would be "likely" to do so, *id.* at 274. But as the Court has been careful to note in the *Miranda* context, officers "cannot be held accountable for the unforeseeable results of their words or actions." *Rhode Island* v. *Innis*, 446 U.S. 291, 301-302 (1980). Rather, the Court's Sixth Amendment jurisprudence is "concerned with interrogation or investigative techniques that [are] *equivalent to* interrogation." *Kuhlmann*, 477 U.S. at 457 (emphasis added); cf. *Moulton*, 474 U.S. at 177 n.13 (informant's participation in a conversation with the accused was "the functional equivalent of interrogation") (quoting *Henry*, 447 U.S. at 277 (Powell, J., concurring)); see also *Nix* v. *Williams*, 467 U.S. at 437 (noting that incriminating statements

had been obtained "by what was viewed as interrogation in violation of [the defendant's] right to counsel").

In this case, police officers neither asked petitioner questions at his house, nor "deliberately elicit[ed]" statements from him before taking him to the jailhouse and giving him *Miranda* warnings. Accordingly, the court of appeals correctly concluded (J.A. 122-123) that the officers' statements and actions did not implicate this Court's Sixth Amendment right-to-counsel cases.[2]

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[2] Petitioner suggests (Br. 12) that the court of appeals "may have used the term 'interrogation' as a shorthand to mean that only *affirmative questioning* of petitioner by the officers outside the presence of counsel would have implicated the Sixth Amendment." But the government's brief in the court of appeals explained that both express questioning and "words or actions that the police should know are reasonably likely to elicit an incriminating response" constitute interrogation. Gov't C.A. Br. 18-19 (quoting *Innis*, 446 U.S. at 301) (internal quotation marks omitted). Although petitioner now asserts that the court of appeals "employed an incorrect legal standard" by referring to "interrogation," Br. 15, the court of appeals' use of the term is consistent with this Court's repeated recognition that the *Massiah* rule is concerned with "techniques that [are] equivalent to interrogation." *Kuhlmann*, 477 U.S. at 457. Moreover, petitioner himself bears some responsibility for how the courts below framed the issue. In the district court, petitioner claimed that he had been subject to "custodial interrogation" in his home, and invoked neither the "deliberate elicitation" standard nor even the Sixth Amendment. See Br. in Supp. of Defendant's Mot. to Suppress 3-4; Br. in Supp. of Defendant's Objection to Report and Recommendation 4; see also J.A. 101, 103 (magistrate judge framed issues as "whether or not the defendant was in custody" and "whether or not he was interrogated"). While petitioner cited the Sixth Amendment in his court of appeals brief, he "argue[d] that the officers * * * interrogated him at his house" and did not invoke the "deliberate elicitation" standard. Pet. C.A. Br. 41.

A. Officers Routinely Explain The Nature Of The Charges Supporting An Arrest For The Benefit Of The Accused, And That Advice Is Not Designed To Elicit A Response

Petitioner contends that Deputy Bliemeister's brief explanation of the conspiracy charges petitioner faced "could only have been 'designed to elicit a response'" from petitioner. Br. 15 (quoting J.A. 103); Br. 39. An officer making an arrest, however, has ample justification for explaining the nature of the charge against the arrested person. The Federal Rules of Criminal Procedure contemplate that law enforcement officers will notify the accused of the charges against him at the time of arrest.[3] Rule 4(c)(3)(A) requires that, in executing an arrest warrant, the officer must show the warrant (which must "describe the offense charged," Fed. R. Crim. P. 4(b)(1)(B)) to the defendant or, if the officer does not have the warrant, must "inform the defendant of the warrant's existence and of the offense charged." Fed. R. Crim. P. 4(c)(3)(A); Fed. R. Crim. P. 9(c)(1)(A); see also Fed. R. Crim. P. 4 advisory committee notes to 2002 amendments ("Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists."). Bliemeister's effort to identify the particular conspiracy by describing its alleged members was not different in principle from informing a murder defendant of the identity of his alleged victim or a bank robbery defendant of the name of the bank he is alleged to have robbed, information entirely in keeping with the language and purpose of the Federal Rules.

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[3] The Federal Rules apply to arrests by a state law enforcement officer on a federal warrant. Rule 4(c)(1) provides that an arrest warrant may be executed by a marshal or "other authorized officer," which has been construed to include state law-enforcement officers. See, *e.g.*, *United States* v. *Bowdach*, 561 F.2d 1160, 1167 (5th Cir. 1977).

Such routine behavior in an arrest setting is not tantamount to interrogation or to conduct deliberately designed to obtain information. Bliemeister testified that, consistent with his usual procedure, he told petitioner about the charges against him and the persons with whom he was accused of conspiring in order to dispel any confusion that petitioner might have had about being accused of current trafficking activity—a likely mistake because the indictment did not itself name his co-conspirators, see J.A. 7, and petitioner's involvement with Kuenning and the others had ended months earlier (indeed, several of them had long been incarcerated). J.A. 56. Bliemeister testified without contradiction that he did not intend to elicit an incriminating response, and indeed, "did [not] expect that [petitioner] would respond."[4] *Ibid.* There was no reason that Bliemeister would have expected that routine information about the nature of the charge would elicit an incriminating response from someone who, like petitioner, had significant experience with the criminal justice system.[5] See Presentence Investigation Report (PSR) ¶¶ 59-64.

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[4] Although the magistrate judge emphasized (J.A. 103) Deputy Bliemeister's negative response when asked whether he was "surprised that [petitioner] made comments in response to his [statement]," J.A. 56, Bliemeister's lack of surprise is not indicative of whether he knew his statement was "likely" to elicit an incriminating response (see *Henry*, 447 U.S. at 274), because it is not uncommon for suspects to make statements of some sort (whether inculpatory, exculpatory, or simply expletives) in response to a police announcement that they are under arrest or have been charged with a crime. Far more probative is Deputy Bliemeister's testimony that he "did [not] expect that [petitioner] would respond" to his statement, J.A. 56, suggesting that he did not intend that petitioner would make a statement, much less incriminate himself.

[5] At the time of his arrest in this case, petitioner had at least three convictions (including one for cocaine distribution, which was set aside after petitioner completed probation, and one for manslaughter related to cocaine distribution), and a separate arrest for assault. See PSR ¶¶ 59-64.

In the related context of *Miranda* warnings, courts have repeatedly held that informing the defendant of the charges against him (or even of the evidence supporting those charges) does not constitute the functional equivalent of interrogation because it is unlikely to elicit an incriminating response.[6] See, *e.g.*, *United States* v. *Benton*, 996 F.2d 642, 644 (3d Cir.) ("it would be unreasonable to conclude that the police intentionally created circumstances likely to elicit a statement from [the suspect]," because the officer "did nothing more than tell [the suspect] why he was being arrested"), cert. denied, 510 U.S. 1016 (1993); *United States* v. *Payne*, 954 F.2d 199, 202 (4th Cir.) ("interrogation is not so broad as to * * * reach all declaratory statements by police officers concerning the nature of the charges against the suspect"), cert. denied, 503 U.S. 988 (1992); *United States* v. *Crisco*, 725 F.2d 1228, 1232 (9th Cir.) ("It cannot be said that Agent Clem should have known that his remarks [explaining drug charges against defendant] were likely to elicit an incriminating response from [the defendant]."), cert. denied, 466 U.S. 977 (1984). Similarly, this Court has held that statements "normally attendant to arrest and custody"—which

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[6] As a matter of Fifth Amendment jurisprudence, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent," and the "functional equivalent" of interrogation in turn consists of "words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 300-301 (footnotes omitted). The Court did remark in *Innis* that "if indeed the term 'interrogation is even apt in the Sixth Amendment context," the Fifth and Sixth Amendment definitions of the term "are not necessarily interchangeable." *Id.* at 300 n.4. But the inquiry that the Court directed under *Innis* into whether declaratory statements constitute "interrogation" under *Miranda* is closely comparable to whether statements by police "deliberately elicit" an incriminating response within the meaning of the Sixth Amendment. Cf. *Kuhlmann*, 477 U.S. at 457.

surely encompass notice of the charges under the Federal Rules—do not constitute "interrogation." *Innis*, 446 U.S. at 301; accord *United States* v. *Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994) (holding that statements that "informed [the defendant] of the circumstances of his arrest" were "properly characterized as statements normally attendant to arrest and custody" and thus were not interrogation); see also *Arizona* v. *Roberson*, 486 U.S. 675, 687 (1988) (holding that even after a suspect invokes his *Miranda* rights in the investigation of one crime, the police "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation").

B. The Arresting Officer's Words Were Not A Deliberate Elicitation Of Information

In support of his claim that Bliemeister's initial statement "surely constitute[d]" (Br. 15) a deliberate attempt to elicit incriminating information, petitioner contends that the officer's use of the word "discuss" to introduce his brief description of the indictment constituted an "invitation * * * to discuss pending charges." Br. 14-15. Taken in context, the record indicates that Bliemeister merely used colloquial language to inform petitioner that he wished to tell petitioner about the charges that he faced. Although one meaning of the word "discuss" denotes speaking about a topic *with* another person, another common use of the word denotes speaking about a topic *to* another person, as a lecture or speech would "discuss" a topic. See, *e.g.*, *Webster's New International Dictionary of the English Language* 746 (2d ed. 1958) ("3. To make clear or open; explain; disclose in speech; declare."); *The American Heritage College Dictionary* 397 (3d ed. 1993) ("1. To speak with others about. 2. To consider (a subject) in speech or writing."); see also *The New Shorter Oxford English Dictionary* 689 (1993) ("4. Make known, declare.") (emphasis omitted).

The officers' conduct was entirely consistent with the understanding that they wished to inform petitioner about the charges and arrest warrant, and inconsistent with any effort to elicit incriminating statements. After stating that he was there "to discuss" petitioner's involvement in methamphetamine distribution, Bliemeister told petitioner in one "continuous * * * statement," J.A. 61, that he had been indicted for conspiring to distribute methamphetamine, that the officers had a warrant to arrest him on that charge, and that the indictment concerned petitioner's alleged involvement with Kuenning, Sardeson, Geffs, and Farfalla. J.A. 18, 61, 86, 112. As the district court found, J.A. 112, the officers did not ask petitioner a single question relating to the charged offense while at petitioner's house. Even after petitioner began speaking, he discussed only his personal and business problems. Petitioner made no reference to drug distribution. Tellingly, the officers made no attempt to steer him to the subject of drug distribution or to his relationship with Kuenning, Sardeson, Geffs, and Farfalla. Petitioner's discussion was essentially a monologue interrupted by a single question from Officer Garnett that "[d]id [not] have anything to do with narcotics trafficking." J.A. 73-74.

There is no indication that the officers attempted to prolong petitioner's statement in the hope he eventually would incriminate himself. After petitioner had spoken a short while, the officers cut petitioner off and told him it was time to leave. J.A. 21, 58-59. Bliemeister's conduct fell far short of being an "investigative technique[] that [is] equivalent to interrogation." *Kuhlmann*, 477 U.S. at 457. It is readily distinguishable from conduct that this Court has found did rise to that level. *Brewer*, 430 U.S. at 393 (officer used psychological ploy to play on murder suspect's religious sensitivities and psychological disorder with emotional plea to afford victim's parents "a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and mur-

dered"); *Henry*, 447 U.S. at 270-275 (incarcerated paid informant engaged in conversations with incarcerated defendant "without arousing [his] suspicion" in a context that had the potential to "elicit information that an accused would not intentionally reveal to persons known to be Government agents"); cf. *Arizona* v. *Mauro*, 481 U.S. 520, 529 (1987) (where defendant "was not subjected to compelling influences, psychological ploys, or direct questioning," his "volunteered statements cannot properly be considered the result of police interrogation" for purposes of *Miranda*).

C. The Court Of Appeals Did Not Usurp The District Court's Fact-Finding Role

Finally, there is no basis for petitioner's suggestion (Br. 15) that the court of appeals acted improperly by "effectively setting aside the lower-court factual findings regarding the officers' conduct." The court of appeals did not disturb the district court's findings of historical fact, and indeed, its recitation of the facts (J.A. 120-121) is consistent with that of the district court (J.A. 111-112). The ultimate question whether police conduct constitutes interrogation or deliberate elicitation is, however, not a question of historical fact, but a mixed question of law and fact that the court properly reviewed de novo.[7] See generally *Thompson* v. *Keohane*, 516 U.S. 99, 111-113 (1995) (whether defendant was in "custody" for *Miranda* purposes "call[ed] for application of the controlling legal standard to the historical facts," and thus issue is a

[7] See, *e.g.*, *United States* v. *Johnson*, 4 F.3d 904, 909-910 (10th Cir. 1993) (determination whether statement was "deliberately elicited" is reviewed de novo), cert. denied, 510 U.S. 1123 (1994); *United States* v. *Spruill*, 296 F.3d 580, 585 (7th Cir. 2002) (same); cf. *United States* v. *Briggs*, 273 F.3d 737, 740 (7th Cir. 2001) (whether statement is functional equivalent of interrogation for *Miranda* purposes is reviewed de novo); *United States* v. *Vega-Figueroa*, 234 F.3d 744, 749 (1st Cir. 2000) (same); *United States* v. *Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000) (same).

"mixed question of law and fact qualifying for independent review" on appeal) (internal quotation marks omitted); *Miller* v. *Fenton*, 474 U.S. 104, 116-117 (1985) (whether confession was "voluntary" is legal issue subject to de novo review).

II. A Voluntary Statement Obtained After An Accused Has Validly Waived His Right To Counsel Is Admissible, Even If The Police Had Earlier Obtained An Uncounseled Post-Indictment Statement

Petitioner contends (Br. 7-9, 16-37) that if the Court finds that the uncounseled statement he made at his arrest was deliberately elicited by the police, his later statement at the jail also must be suppressed as the fruit of the poisonous tree—even though petitioner made his jailhouse statement after he received *Miranda* warnings and validly waived his right to have counsel present during the police interrogation. Petitioner claims that the elicitation of his initial statement was a Sixth Amendment violation; that his later jailhouse statement was the fruit of his earlier statement because the first statement let the cat out of the bag and created "psychological pressures" that affected his "willingness to make a subsequent inculpatory statement" (Pet. Br. 7); and that the government can avoid suppression of the second statement only by satisfying one of the established exceptions to the exclusionary rule. The extension of "fruits" analysis that petitioner proposes would depart from the rule that this Court adopted in the analogous Fifth Amendment context in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). It also misconceives both the function of the Sixth Amendment and the significance of petitioner's waiver of counsel at the jailhouse. And it would impose unjustified costs on society by precluding the admission of reliable and voluntary confessions obtained after a valid waiver of the right to counsel. The approach taken in *Elstad* in the Fifth Amendment context is equally

valid in the Sixth Amendment context, and it should be adopted in this case.

A. *Oregon* v. *Elstad* Provides The Appropriate Rule When The Police Obtain Voluntary, Warned Statements After Previously Obtaining Unwarned Statements

In *Oregon* v. *Elstad*, *supra*, this Court confronted an analogous claim under the Fifth Amendment that a suspect's giving of an initial statement without *Miranda* warnings tainted his later provision of a second statement after he received *Miranda* warnings and waived his rights. In *Elstad*, the police went to Elstad's house to arrest him for burglary. Without administering *Miranda* warnings, one officer asked Elstad whether he knew why the police had come, and Elstad admitted that he was at the scene of the burglary. One hour later, when Elstad was at the jailhouse, the same officers who had taken the earlier statement administered *Miranda* warnings. Elstad then waived his rights and made additional incriminating statements. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, this Court concluded that, "absent deliberately coercive or improper tactics in obtaining the initial statement," a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." 470 U.S. at 314. The Court explained that, in the absence of police coercion, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318.

Although this case arises under the Sixth Amendment, the approach taken in *Elstad* is sound in this context as well. Assuming that the officers' statements when arresting petitioner amounted to the deliberate elicitation of information from an accused who had not waived his right to counsel, the officers' later provision of *Miranda* rights gave petitioner the information he needed to decide whether to assert his right to counsel. See *Patterson*, 487 U.S. at 296-298; see also p. 31, *infra*. In *Elstad*, the Court reasoned that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Elstad*, 470 U.S. at 308. The same is true with respect to the accused's decision whether to deal with questioning by the police "with the aid of counsel, or go it alone." *Patterson*, 487 U.S. at 291. Following a defendant's voluntary, knowing, and intelligent waiver of counsel, his statements should be held admissible. There is no greater need here than in *Elstad* for an additional analysis of the factors that would bear on an attenuation of the taint in other contexts. Cf. *Elstad*, 470 U.S. at 304-314 (rejecting fruit-of-the-poisonous-tree analysis under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and also rejecting any requirement that there be a break in the chain of events, beyond the giving of *Miranda* warnings, before the subsequent warned and voluntary confession may be admitted).

Petitioner correctly notes (Br. 34) that the Fifth and Sixth Amendments serve "distinct values," and, consequently, operate differently in certain contexts. For example, the Fifth Amendment applies to custodial interrogation even before the bringing of formal charges, while the Sixth Amendment covers questioning even when the defendant is not in custody or aware that he is speaking to an agent of the government. See *McNeil* v. *Wisconsin*, 501 U.S. 171, 178 (1991); *Patterson*, 487 U.S. at 296-297 n.9. Nevertheless, because the assistance of counsel serves a similar role during pretrial

questioning by the police regardless of whether the right to counsel arises under the Fifth or Sixth Amendment, *Patterson*, 487 U.S. at 298-299 & n.12, "it should be no surprise," *id.* at 299 n.12, that the Court's jurisprudence concerning a suspect's pretrial rights under the two provisions is analogous in important respects and that the Court has often applied doctrine developed in one field to the other.

Significantly, the Court has held that advising an accused of his *Miranda* rights is generally sufficient to permit a knowing and intelligent waiver of the Sixth Amendment right to counsel during police questioning because of the "strong similarity between the level of knowledge a defendant must have to waive his Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights." *Patterson*, 487 U.S. at 299 n.12.[8] Likewise in developing prophylactic rules to protect Fifth Amendment rights, the Court has "noted the relevance of various Sixth Amendment precedents," *Michigan* v. *Jackson*, 475 U.S. 625, 630 (1986) (citing *Edwards* v. *Arizona*, 451 U.S. 477, 484 n.8 (1981)), and it has incorporated the Fifth Amendment rule of *Edwards*, dealing with police-initiated questioning of a suspect who has asserted his right to counsel, into the Sixth Amendment, see *Jackson*, 475 U.S. at 636. The Court similarly incorporated the Fifth Amendment rule permitting a defendant to be impeached with statements taken in police-initiated questioning after the invocation of the *Miranda* right to counsel into the parallel Sixth Amendment setting. *Harvey*, 494 U.S. at 350-351. See also *McNeil*, 501 U.S. at 183 (Kennedy, J., concurring) (Court should "devote some attention to bringing its Fifth and Sixth Amendment

[8] *Patterson* did not address whether "an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid," because the defendant in that case had been so informed. 487 U.S. at 295-296 n.8. The same is true here.

jurisprudence into a logical alignment"). As explained below, in this context as well, an analysis of the relevant considerations shows that *Elstad*'s Fifth Amendment rule—that a voluntary statement made by a defendant who waives his rights after receiving *Miranda* warnings is admissible notwithstanding his making of an earlier voluntary statement in which he had not been advised of his rights—is equally valid under the Sixth Amendment.

B. Petitioner's Claim That The Sixth Amendment Is Violated At The Moment When The Police Obtain Post-Indictment Statements Without A Valid Waiver Of Counsel Does Not Warrant A Departure From the *Elstad* Rule

Petitioner argues that *Elstad* does not apply in the Sixth Amendment context because, unlike in *Elstad*, there is a constitutional violation that occurs at the time of the taking of the initial, unwarned statement. Pet. Br. 34; see *id.* at 8, 16-19. In explaining in *Elstad* why the "broad application" of the "fruits" doctrine in Fourth Amendment cases is unsuited to the *Miranda* context, the Court did note that the *Miranda* exclusionary rule, unlike the Fourth Amendment one, may be triggered even in the absence of a constitutional violation. 470 U.S. at 306-307, 308. But the distinction that petitioner would draw between this case and *Elstad* is unsound, because there is no completed violation of the Sixth Amendment right to the assistance of counsel simply because police engage in post-indictment questioning of the accused without a valid waiver of counsel. Rather, a Sixth Amendment violation does not occur unless the resulting information is used against the defendant at trial.

As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public

prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). In order to protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel beyond the trial itself to "certain 'critical' pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (citations and internal quotation marks omitted). In doing so, the Court has not treated the right to counsel as a freestanding constitutional norm. Rather, this Court has emphasized that the "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658; *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984). Post-indictment questioning of an accused, this Court has determined, is a critical stage of the proceedings. Because the introduction at trial of uncounseled and unwarned post-indictment statements undermines the ability of counsel to render assistance that contributes to a fair trial, this Court has held that "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant without an express waiver of the right to counsel." *Harvey*, 494 U.S. at 348; see pp. 11-12, *supra*.

A completed violation of the Sixth Amendment, however, does not occur at the moment that statements are deliberately elicited from a defendant without a valid waiver of the right to counsel. As the Court wrote in *Massiah*, a defendant is "denied the basic protections of th[e] [Sixth Amendment] guarantee *when there [i]s used against him at his trial* evidence of his own incriminating words, which federal

agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added). There, the government had argued that agents "were completely justified in making use of [the informant's] cooperation by having [him] continue his normal associations and by surveilling them," *ibid.*, which had resulted in the informant taping statements made by the accused without *Miranda* warnings and outside the presence of counsel. The Court explicitly declined to pass on the propriety of the investigative activity, instead addressing only its admissibility at trial: "We do not question that in this case * * * it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements * * * could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Id.* at 207; see *Moulton*, 474 U.S. at 179 (same).

Other cases also support the proposition that out-of-court conduct of government agents does not itself complete a violation of the right to counsel so long as the conduct does not impair the defendant's right to a fair trial. For example, this Court held in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), that it did not violate the Sixth Amendment right to counsel for an undercover agent to attend defense strategy meetings with an accused and his attorney. The Court emphasized that, because the agent had not communicated what was said to others on the prosecution team, there was no "realistic possibility" of injury to the defendant's fair trial interests and thus "there can be no Sixth Amendment violation." *Id.* at 558; see *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing *Weatherford* for the proposition

that "where interference with assistance of counsel has no effect on trial, no Sixth Amendment violation lies").[9]

That understanding is supported by an examination of the Sixth Amendment as a whole. The rights guaranteed by the Amendment—the accused's right to a speedy and public trial by an impartial jury, his right to be informed of charges, his right to be confronted by the witnesses against him, and his right to compulsory process to obtain witnesses in his favor—are, at the core, rights designed to ensure a fair trial. Although the actions of law enforcement before trial may impair the defendant's Sixth Amendment rights, those guarantees generally can be violated only when the defendant's ability to receive a fair determination of guilt has been fatally compromised. See *California* v. *Green*, 399 U.S. 149, 157 (1970) (Confrontation Clause guarantees "right to 'confront' the witnesses *at the time of trial*") (emphasis added); cf. *Ross* v. *Oklahoma*, 487 U.S. 81, 86 (1988) (holding that allegation of denial of right to impartial jury must focus "on the jurors who ultimately sat"); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (to show denial of right of compulsory process from government deportation of witnesses, defendant "must at least make some plausible showing of how their testimony would have been both material and favorable to his defense" at trial); *Strunk* v. *United States*, 412 U.S. 434, 439 (1973) ("failure to afford a public trial, an impartial jury, notice of charges, or compulsory

[9] The Sixth Amendment right to counsel is not solely concerned with the effect on a fair trial; it applies also in the entry of a guilty plea, *Lockhart* v. *Nelson*, 488 U.S. 33 (1988), and at sentencing, *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Right to counsel violations can occur in those proceedings. But those proceedings involve the ultimate determination of criminal liability and punishment, and in that sense are more analogous to trial than to pretrial proceedings.

service can ordinarily be cured by providing those guaranteed rights in a new trial").[10]

Consistent with those principles, as Justice Stevens has explained, "[t]he Sixth Amendment right to counsel * * * is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting) (citations and internal quotation marks omitted). That view is confirmed by commentators. See, *e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 889 (1981) ("*Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against *him* at his trial.'") (quoting *Massiah*, 377 U.S. at 207); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 Mich. L. Rev. 907, 932 (1989) ("nothing unconstitutional occurs until illegal evidence is used").[11]

[10] The denial of the right to a speedy trial cannot, of course, be cured by a prompt re-trial. See *Strunk*, 412 U.S. at 434; *Doggett* v. *United States*, 505 U.S. 647 (1992). But ordinarily, a speedy trial dismissal reflects a finding that trial prejudice is either shown or its presumption was not successfully rebutted, *e.g.*, *Doggett*, 505 U.S. at 654-658, and dismissal of the indictment with prejudice thus is consistent with the fair-trial purpose of the Sixth Amendment. To the extent that the Speedy Trial Clause independently protects values other than the fairness of the trial, see *Strunk*, 412 U.S. at 434, it differs from the right to counsel, which this Court has made clear exists for the purpose of securing the defendant's right to a fundamentally fair trial. *Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 684-685.

[11] Some of the cases petitioner cites (Br. 12) contain dicta indicating that a Sixth Amendment violation is complete "as soon as the State's agent engage[s] [the accused] in conversation about the charges pending

There is, therefore, no basis for declining to apply *Elstad* in the Sixth Amendment context on the theory that, in this case, there was a violation of the Constitution at the time that Deputy Bliemeister spoke with petitioner at his house without advising him of his right to counsel. In line with the purpose of the Sixth Amendment right to counsel to assist an individual in meeting the prosecution's case in a fair trial, *Strickland*, 466 U.S. at 685, the focus of the Amendment is on effects at trial. The exclusion of statements made without a valid waiver of counsel preserves the adversary balance, without the need for treating the elicitation of the statements as a constitutional violation that requires suppression of statements that the accused made *after* validly waiving counsel.

C. Even Assuming A Sixth Amendment Violation, Suppression Of Subsequent Statements Made After A Valid Waiver Of Counsel Is Not Justified On A Derivative-Evidence Theory

Even if there were some basis for viewing the violation of the Sixth Amendment as complete at the time that deliberately elicited statements are obtained, the approach taken in *Elstad*, rather than the multi-factor attenuation-of-the-taint test petitioner advocates, see Pet. Br. 8, 26, 37, should be applied to determine the admissibility of subsequent statements made after a knowing and intelligent waiver of the

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against him." *Moulton*, 474 U.S. at 177-178 n.14; *Kuhlmann*, 477 U.S. at 457; *Henry*, 447 U.S. at 274. In those cases, however, the Court did not squarely address when a violation of the right to counsel occurs. Indeed, in those decisions, the Court framed the issue in a manner suggesting that a violation would occur *only* when improperly obtained statements were introduced at trial. See *Moulton*, 474 U.S. at 161 ("[t]he question presented in this case is whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by him to * * * a secret government informant[] after indictment"); *Henry*, 447 U.S. at 265 (same).

right to counsel. The *Elstad* Court emphasized that "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves 'interests and policies' that are distinct from those it serves under the Fifth." 470 U.S. at 306 (quoting *Brown* v. *Illinois*, 422 U.S. 590, 601 (1975)). The Court in *Elstad* concluded that, in light of the different interests at stake in Fourth and Fifth Amendments cases, there was no basis for adopting wholesale in the *Miranda* context the broad derivative-evidence exclusion developed for Fourth Amendment violations. See *id.* at 305-309, 318. Analysis of the appropriate rule for second confessions in the Sixth Amendment context, must, therefore, focus on the nature of the right at issue. See *United States* v. *Bayer*, 331 U.S. 532, 541 (1947).

The nature of the right to the assistance of counsel warrants employing an approach analogous to *Elstad*. The admission of subsequently obtained statements after administration of *Miranda* warnings does not offend Sixth Amendment values. The Sixth Amendment serves to "protect[] the unaided layman at critical confrontations with his adversary." *Gouveia*, 467 U.S. at 189. In the context of postindictment interrogation, the *Miranda* warnings convey to the accused at the time of questioning "the sum and substance of the rights that the Sixth Amendment provide[s]." *Patterson*, 487 U.S. at 293. The *Miranda* warnings make the accused "aware of his right to have counsel present during the questioning" and also "make [him] aware of the consequences of a decision by him to waive his Sixth Amendment rights during postindictment questioning" by informing him "that any statement that he made could be used against him in subsequent criminal proceedings." *Ibid.* The warnings thus "suffice[] * * * to let [the accused] know what a lawyer could 'do for him' during the postindictment questioning." *Id.* at 294. An accused is entitled to know of those rights before forgoing counsel. Initial deliberately

elicited statements, made without *Miranda* warnings and a valid waiver, therefore must be excluded. But because the lack of *Miranda* warnings is the "condition[] that precluded admission of the earlier statement," *Elstad*, 470 U.S. at 314; see generally *Harvey*, 494 U.S. at 349, the "remov[al]" of that condition by providing the *Miranda* warnings neutralizes any police error and can render the later statement admissible. After the warnings have been given, and a suspect voluntarily and intelligently waives his rights, the decision to speak without counsel represents an independent act of free will.

This does not make *Miranda* warnings a "cure-all" (Pet. Br. 29, 41). The warnings, of course, do nothing to permit the admission of the first, unwarned and uncounseled, statement. And, as to a second statement given after the accused knowingly and intelligently waived counsel, the government must still establish that the waiver of rights was voluntary. *Patterson*, 487 U.S. at 292 n.4. Badgering or misleading conduct by authorities may preclude such a showing. *Harvey*, 494 U.S. at 353-354. Interference with a defendant's access to counsel also raises Sixth Amendment concerns. *Burbine*, 475 U.S. at 428. And where investigators obtain the unwarned initial statement through coercion or the application of excessive psychological pressure, the defendant may not be able to make a knowing and voluntary decision to speak because the "continuing effect of the coercive practices" (*Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944)) may carry over to the second encounter despite the warnings. Cf. *Elstad*, 470 U.S. at 310 (requiring a break in the chain of events "[w]hen a prior statement is actually coerced"). But there can be no claim that unadorned police questioning about charges or a simple invitation to discuss them, without the use of pressure tactics or direct interference with an accused's desire for counsel, could taint a later otherwise-valid post-warning waiver of counsel.

Petitioner's central argument why *Miranda* warnings are presumptively inadequate to render subsequent statements admissible rests on the claim that the psychological and practical constraints of having made an initial statement prevent an accused from making a knowing and voluntary decision to refrain from speaking to investigators even after he has received warnings. See Pet. Br. 7, 21, 22, 23, 24-25, 36, 40. Essentially, petitioner contends, because he let the "cat * * * out of the bag" (Br. 36) in his initial statement, he was necessarily more likely to "make a subsequent inculpatory statement" (Br. 7) as he was under the "erroneous impression that he ha[d] nothing to lose . . . in a . . . decision to speak a second or third time." Br. 35 (quoting *Darwin* v. *Connecticut*, 391 U.S. 346, 351 (1968) (per curiam) (Harlan, J., concurring in part and dissenting in part)).

The defendant in *Elstad* propounded the same "cat out of the bag" theory, and this Court rejected it as a matter of law, holding that a defendant's knowledge that he already has incriminated himself does not compromise the voluntariness of a later post-warning statement. 470 U.S. at 309-314. The Court explained that it has "never held that the psychological impact of voluntary disclosure of a guilty secret * * * compromises the voluntariness of a subsequent informed waiver." *Id.* at 312. A voluntary waiver is valid, even if the defendant is "unaware that his prior statement could not be used against him." *Id.* at 316. The same conclusion applies here. The administration of *Miranda* warnings furnishes the defendant with the necessary information about his rights. Even if the accused earlier spoke to authorities and were laboring under the misunderstanding that his initial statement was admissible, and even assuming that the accused felt some need to explain the earlier statement, the *Miranda* warnings make clear that the accused is perfectly free to wait until after he has met with counsel before speaking further.

Contrary to petitioner's claim (Br. 24), *Elstad*'s rejection of the "cat out of the bag" theory did not rest simply on the conclusion that "a suspect's internal psychological pressures" did not qualify as state compulsion sufficient to implicate the Fifth Amendment, but represented a more basic rejection of the validity of the theory. The Court reasoned that "the causal connection between any psychological disadvantage created by [an initial] admission and [an] ultimate decision to cooperate is speculative and attenuated at best." 470 U.S. at 313-314. The Court emphasized that a defendant's motivation in deciding to waive counsel and provide a statement is essentially unknowable, *id.* at 314 ("[i]t is difficult to tell with certainty what motivates a suspect to speak"), and could stem from a variety of personal factors unrelated to his prior statement, including remorse, a desire to curry favor with the authorities, or a pre-arrest conversation with a family member or friend. *Ibid.* Indeed, the decision may be entirely instinctive and have no rational motivation at all. Recognizing this, the Court "has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Id.* at 311 (quoting *Bayer*, 331 U.S. at 540-541); cf. *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975) ("a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity").

Petitioner claims (Br. 21-22) that this Court's cases have recognized that defendants who have already made statements will feel there is "little to be gained * * * from attempting to avoid further self-incrimination," and that such a subjective belief creates a link between a first deliberately elicited statement taken without a valid waiver of counsel,

and a second statement taken with a valid waiver of counsel. None of those earlier cases detracts from the holding in *Elstad* that the cat-out-of-the-bag theory is too speculative to serve as the foundation for a finding that a second warned statement is the fruit of a first unwarned statement. The leading case—*United States* v. *Bayer*, 331 U.S. at 540-541—observed only that once a defendant's "secret" is out, he cannot get "the cat back in the bag" and "[i]n such a sense, a later confession always may be looked upon as fruit of the first." *Id.* at 540. But the Court articulated that point in order to *reject* it. In its analysis, the Court did not presume any taint flowing from the defendant's knowledge of his prior confession. Instead, the Court emphasized that the Fourth Amendment fruits cases on which the court of appeals had relied "did not deal with confessions * * * and do not control this question." *Id.* at 541. The Court then examined whether the restraints imposed on the defendant at the time of his statement invalidated its use, and it found that they did not. Any disadvantage that the accused subjectively may have felt from his earlier confession played no role in the Court's analysis of whether his "confession voluntarily given after fair warning [was] invalid as evidence against him." *Ibid.* As for *Darwin* v. *Connecticut*, *supra* (cited at Pet. Br. 21), the Court's brief per curiam opinion did not even mention the "cat out of the bag theory," but simply found the defendant's later confession involuntary. The concept that a defendant might confess again because he "might think he has little to lose" was voiced only by Justice Harlan in his separate opinion. 391 U.S. at 350-351 (Harlan, J., concurring in part and dissenting in part).[12]

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[12] Petitioner also relies (Br. 22) on this Court's Fourth Amendment cases in which confessions following illegal arrests were found to be suppressible fruits. See *Brown*, 422 U.S. at 605 & n.12; *Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979). In both *Brown* and *Dunaway*, the

Petitioner's reliance (Br. 22, 23) on *Harrison* v. *United States*, 392 U.S. 219 (1968), is also misplaced. In *Harrison*, the defendant made a decision to testify at trial after "the Government had illegally introduced into evidence three confessions, all wrongfully obtained" that the defendant had admitted to shooting the victim during a botched burglary. *Id.* at 222. The Court noted that, but for the illegal admission into evidence of those statements, the defendant would have been unlikely to have testified or to have "admitted being at the scene of the crime and holding the gun when the fatal shot was fired." *Id.* at 225. Harrison thus made the admission only after his initial statement had been used against him at trial. A defendant's decision to react to trial evidence that has already been introduced says little or nothing about a defendant's ability to make a free decision at the jailhouse about whether to speak with authorities without counsel. *Harrison* therefore does not undercut the conclusion that follows from *Elstad*: notwithstanding a prior statement, when the *Miranda* warnings have informed the accused that there is no need to speak further to police without the assistance of counsel, his decision to speak without counsel should be respected as the individual's free choice.

D. There Is No Other Reason For Applying A Broad Fruits Analysis, Developed In Other Contexts, To This Sixth Amendment Context

Petitioner argues (Br. 16-19) that the broad exclusion of derivative evidence developed in this Court's Fourth

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Court remarked that the giving of second statements by the arrestees was "clearly the result and the fruit of the first." *Ibid.* But the dominant fact in both cases was that, at the time that the defendants gave their statements, they remained in police custody following their illegal arrests. The Court's additional observation on the relationship of the two statements was not necessary to the fruits analysis. Any broader reading of those cases would conflict with *Elstad*.

Amendment cases should be incorporated wholesale into right-to-counsel jurisprudence. Under *Brown* v. *Illinois*, *supra*, when a defendant has provided a confession that is potentially tainted by an unlawful arrest, a court is to examine "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct," 422 U.S. at 603-604 (footnote and citations omitted), in order to determine whether the confession is "sufficiently an act of free will to purge the primary taint," *id.* at 602 (quoting *Wong Sun*, 371 U.S. at 486). *Miranda* warnings are "an important factor," but do not automatically mean that "the Fourth Amendment violation has not been unduly exploited." *Id.* at 603. See *Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (per curiam). The Fourth Amendment approach should be rejected in this context.

The Court has recognized the different purposes of the Fourth Amendment exclusionary rule and the Sixth Amendment, see, *e.g.*, *Kimmelman* v. *Morrison*, 477 U.S. 365, 374-376 (1986), and those differences warrant a different approach to the exclusion of purported derivative evidence in the form of the accused's statements following a valid waiver of the right to counsel. The Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Because the constitutional violation is already complete and cannot be cured, the "admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation," by application of a judicially created exclusionary rule. *United States* v. *Janis*, 428 U.S. 433, 443 (1976). The giving of *Miranda* warnings can never undo or "cure" a completed Fourth Amendment violation; when

the police question a defendant whom they are holding in violation of the Fourth Amendment, the questioning in at least some degree constitutes an "exploitation of the illegality" of the unlawful search or seizure because, but for the illegal search or seizure, police would never have had occasion to question him. *Brown*, 422 U.S. at 600; see also *id.* at 603 (*Miranda* warnings "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited").

In contrast, the giving of *Miranda* warnings can effectively "remove the conditions" (*Elstad*, 470 U.S. at 314) that render inadmissible earlier statements deliberately elicited from a defendant without a valid waiver of the right to counsel. This Court has cautioned that subsequent testimony "is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized" because "[t]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give." *Id.* at 308-309 (quoting *United States* v. *Ceccolini*, 435 U.S. 268, 277 (1978) (emphasis in *Elstad*)). Because the suspect who has been advised of his rights ordinarily "is free to exercise his own volition in deciding whether or not to make a statement to the authorities," *id.* at 308, the warnings and the accused's waiver of counsel break any link to the underlying Sixth Amendment concern that precluded admission of the first statement. There is no need for a multi-factor analysis to insure that the second confession was a product of the defendant's free decision to forgo counsel. The Sixth Amendment interest in providing the accused a fair trial is vindicated entirely by excluding the first statement from the government's case in chief, leaving the trial court free to honor the accused's voluntary and informed decision to waive counsel during the police questioning that led to the second statement.

This Court's Sixth Amendment cases in the area of "fruit of the poisonous tree" analysis also are of no assistance to petitioner. In *Nix* v. *Williams*, 467 U.S. 431, 442 (1984), the defendant contended that evidence of the location and condition of the murder victim's body was the product of the deliberate elicitation of statements in violation of his right to counsel, and, therefore, that the evidence about the body should not have been admitted at his trial. *Id.* at 441. While indicating that "fruits" analysis has been applied under the Sixth Amendment, *id.* at 442 (citing *United States* v. *Wade*, 388 U.S. 218 (1967)), this Court rejected the defendant's claim by recognizing and applying the inevitable discovery exception to the exclusionary rule and holding that the murder victim's body would have been inevitably discovered. *Id.* at 440-450. In *Wade*, the Court determined that a post-indictment lineup was a critical stage under the Sixth Amendment, and, after finding that an uncounseled lineup had occurred, remanded for the lower courts to determine whether a witness's in-court identification of defendant was tainted by the earlier uncounseled and inadmissible post-indictment lineup. 388 U.S. at 239-243.

The derivative evidence in *Nix* consisted of the location and condition of an inanimate object—a murder victim's body. With respect to such physical evidence, the primary inquiry is the degree of the objective causal relationship between the discovery of the evidence and the unlawful elicitation of uncounseled statements. No subjective question of free will enters the analysis, because once a defendant makes a statement that is inadmissible under the Sixth Amendment, he is powerless to prevent the authorities from uncovering physical evidence to which the inadmissible statement might lead. The courtroom identification in *Wade* was said to be potentially inadmissible because the witness's identification may have "crystallize[d]" during a lineup conducted without the presence of counsel, and, because counsel was

not present, he could not effectively cross-examine the witness so as to reveal any earlier skewing of his identification. 388 U.S. at 240-241. The Court, accordingly, required the government to establish an "independent origin" for the in-court identifications. *Id.* at 242.

In this case, by contrast, the alleged fruits evidence consists of a second statement voluntarily made by an accused after receiving *Miranda* warnings and knowingly and intelligently waiving his right to counsel. As a result of the warnings, petitioner knew that he could avoid police questioning simply by invoking his right to counsel. He also knew that he could deprive the authorities of a second statement simply by declining to speak. And at trial, nothing about petitioner's first statement compromised the role of counsel, because that statement was inadmissible. In this setting, unlike in *Nix* or in *Wade*, the analysis should turn on the defendant's informed choice to waive his right to counsel before making a statement. As in *Elstad*, the provision of advice about the defendant's rights and his ensuing voluntary waiver is sufficient to justify admissibility.

E. The Costs Of Excluding Subsequent Statements Made After A Valid Waiver Of Counsel Outweigh Any Countervailing Interests

Suppression of the second statement under a broad "fruits" analysis would also impose significant social costs without offsetting benefits to the protection of constitutional rights. The suppression of statements made after a voluntary, knowing, and intelligent waiver of the Sixth Amendment right to counsel has substantial costs for the sound administration of justice. As this Court has repeatedly observed, "[a]dmissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532

U.S. 162, 172 (2001) (citations and internal quotation marks omitted). Voluntary confessions that are made after the accused has been advised of his rights and has decided to forgo counsel are highly probative and reliable evidence of guilt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.") (quoting *Bruton* v. *United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting)). Excluding such confessions damages the truth-seeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free.

There is no sufficient justification for imposing these costs. At most, deterrence has only an attenuated role to play in this context, because the Sixth Amendment right to counsel places restrictions on "the use of the evidence for trial, not the method of its collection prior to trial." *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting); *Cronic*, 466 U.S. at 658. *Massiah* itself disavowed any intention to shape the out-of-court conduct of investigators, and simply announced a rule of admissibility.[13] See 377 U.S. at 207. But even if deterrence were a relevant consideration, investigators already have adequate incentives to refrain from speaking with indicted defendants before giving *Miranda* warnings and obtaining a valid waiver. The inadmissibility of an unwarned statement from the prosecution's case in chief itself

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[13] Indeed, there are situations in which police should be permitted to proceed with questioning without counsel—for example, where an accused is thought to know the location of a sick or vulnerable kidnapping victim, cf. *Brewer*, 430 U.S. at 393, or of an imminent attempt to kill a witness, cf. *Moulton*, 474 U.S. at 179-180. Resulting statements would be inadmissible, however, if the questioning related to the charge for which the accused stood indicted. See generally Schulhofer, 79 Mich. L. Rev. at 889 ("*Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against *him* at his trial' ") (quoting *Massiah*, 377 U.S. at 207).

provides a significant incentive to give *Miranda* warnings before speaking with indicted defendants. Cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"). Police officers who engage in interrogation before giving *Miranda* warnings also run the risk of a judicial finding that the statement was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In that event, the initial statement would be unusable for any purpose, physical evidence derived from the statement might have to be suppressed, and before any subsequent statements were admissible, the court would have to carefully examine such factors as lapse of time and the presence or absence of intervening circumstances to decide whether the coercion "ha[d] carried over into the second confession." *Elstad*, 470 U.S. at 310. In contrast, officers who give *Miranda* warnings and obtain explicit waivers before speaking with the accused are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984). Thus, contrary to petitioner's claim (Pet. Br. 30, 40-41), rejection of his position will still leave officers with strong incentives to give *Miranda* warnings and to refrain from unwarned interrogation of indicted defendants.[14]

[14] Both the Federal Bureau of Investigation and the Drug Enforcement Administration require agents to provide *Miranda* warnings and obtain a waiver before interviewing persons who have been charged with a crime. See FBI, *Legal Handbook for Special Agents* § 7-3.2 (1994) ("The [*Miranda*] warnings and waiver are required where a person has been previously charged with a crime by indictment, information or presentment for an initial appearance and is subsequently interviewed about the pending charge or a closely related offense."); *DEA Agents Manual* § 6641.32 (2002) ("Prior to interviewing any defendant, he/she must be advised of his/her constitutional rights.").

In sum, excluding voluntary statements made after an otherwise-valid waiver of the right to counsel would come "at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest" in the assistance of counsel. *Elstad*, 470 U.S. at 312; see also *McNeil*, 501 U.S. at 181 (the "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable").

III. Petitioner's Second Statement Is Admissible Even Under The Broad Derivative-Evidence Exclusionary Rule Petitioner Advocates.

Even if this Court were to conclude that the officers' initial interaction with petitioner violated his Sixth Amendment rights, and even if it concludes it is appropriate to apply the broad derivative-evidence exclusionary rule that petitioner advocates, the Court nonetheless should affirm the decision of the court of appeals permitting use of petitioner's post-warning statement. As noted, in the Fourth Amendment context, to determine whether a subsequent statement was sufficiently independent to dissipate the taint of the illegal search or seizure, the Court has examined the "temporal proximity" of the constitutional violation to the discovery of the derivative evidence in question, "the presence of intervening circumstances, and * * * the purpose and flagrancy of official misconduct," to determine whether the confession was "an act of free will [sufficient] to purge the primary taint." *Kaupp*, 123 S. Ct. at 1847 (quoting *Brown*, 422 U.S. at 603, and *Wong Sun*, 371 U.S. at 486). The

Court has cautioned, however, that "[t]he workings of the human mind are too complex" to permit resort to a single "talismanic test," and emphasized that "whether a confession is the product of a free will * * * must be answered on the facts of each case" and "[n]o single fact is dispositive." *Brown*, 422 U.S. at 603. Viewed as a whole, the facts of this case demonstrate that the second statement was not the fruit either of police misconduct or of the first statement, but an independent and informed act of free will.

First, when the officers spoke to petitioner at his house, they engaged in no conduct that could have influenced his later decision, after receiving *Miranda* warnings, to waive counsel and answer questions. The officers, who were dressed in plain clothes and were not carrying weapons visibly, J.A. 16, 66, 70, did not offer petitioner any promises or inducements, did not apply any pressure, and did not even seek to persuade him of the wisdom of cooperating. Deputy Bliemeister's statement of the charges petitioner faced and the persons with whom petitioner was believed to have conspired *at most* constituted an invitation to speak, presented in an unthreatening manner as petitioner sat sipping iced tea on his living-room sofa. J.A. 19. The officers' restrained conduct in no way could have overborne petitioner's will or otherwise impaired his ability to make an autonomous decision to waive his rights after he had been advised of them. Cf. J.A. 104 (magistrate judge concluded that petitioner "voluntarily agreed to talk with the officers" at the jailhouse). Although petitioner emphasizes (Br. 22, 38) that only approximately a half hour passed between petitioner's statement at his house and his interview at the jail and the same officers were involved in both encounters (Br. 20-21), this Court has recognized that, even without a change in personnel, "relatively short" periods are sufficient to dispel the taint of illegality if, as here, the encounter with police was not "under the strictest of custodial conditions." *Rawlings* v.

Kentucky, 448 U.S. 98, 107-108 (1980) ("relatively short" 45-minute period that elapsed between illegal detention and Mirandized statement was sufficient to purge taint where suspects were detained "quietly in the living room" and police were courteous).

Petitioner errs in contending (Br. 39) that Deputy Bliemeister's conduct was particularly flagrant and constituted "nothing less than a total and blatant disregard of this Court's decisions." Bliemeister's brief statement of the charges against petitioner during the initial encounter at petitioner's house "does not rise to the level of * * * flagrant misconduct requiring prophylactic exclusion of petitioner's [subsequent] statements." *Rawlings*, 448 U.S. at 109-110. In marked contrast to cases in which this Court has found suppression to be warranted, the conduct at issue here was neither clearly illegal nor performed with the apparent intention of overpowering the defendant's will to resist. Compare *Brown*, 422 U.S. at 604-605 (arrest and search at gunpoint conducted without a warrant and unsupported by probable cause was performed in a manner apparently "calculated to cause surprise, fright, and confusion"); *Kaupp*, 123 S. Ct. at 1847 (warrantless arrest of a minor at 3 a.m., followed by his "removal from [the] house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene"). If Deputy Bliemeister had said that he wished to "tell" petitioner about the indictment and arrest warrant rather than saying he wished to "discuss" them, then Bliemeister would simply have complied with the Federal Rules and could not even arguably be viewed as having deliberately elicited statements from petitioner. The mere choice of a single word, even if infelicitous, does not transform an otherwise unremarkable notification of charges into a flagrant constitutional violation. Cf. *Innis*, 446 U.S. at 303 ("we cannot say that the officers should have known that it

was reasonably likely that [the defendant] would * * * respond" to "a few offhand remarks").

Second, contrary to petitioner's assertions, see Br. 21, 40, petitioner's second statement did not "address[] subjects * * * identical to * * * those covered in the initial statement." Br. 20. In the statement petitioner made at his house, he discussed personal problems he had been having, including a divorce, business problems with a former business partner, and methamphetamine use. J.A. 48. While petitioner may have acknowledged that he had associated in some manner with at least some of the individuals named by Deputy Bliemeister (see J.A. 18-19, 47), petitioner said nothing about drug distribution or the "fronting" of money, nor did he link any of them to methamphetamine distribution. J.A. 48, 62, 87, 92, 104-105. To the extent that petitioner made damaging admissions in his second statement (*e.g.*, that he had bought drugs from some of the persons named by the officers, that he had "loaned" money to Kuenning, that he had associated with each of the persons the officers mentioned), he was divulging entirely new information that he had an undiminished incentive to conceal, and could not plausibly have supposed that he had "nothing [more] to lose" (Pet. Br. 40) by answering questions at the jail. Appreciating that fact, even the magistrate judge—the only jurist involved in the proceedings below who believed that *any* portion of the second interview should be suppressed—concluded that petitioner's statements about the "distribution of methamphetamine" and his "fronting money" "[o]bviously * * * need not be suppressed." J.A. 104-105.

Petitioner's claim to be "[i]gnorant of his legal rights" (Br. 40; see also Br. 21) is questionable given his extensive experience with the criminal justice system (see p. 16 & n.5, *supra*) and widespread popular knowledge that there are restrictions on the admissibility of statements given without

the benefit of *Miranda* warnings. But even accepting that claim, it requires little legal sophistication to understand that an admission that one *used* an illegal drug is not tantamount to an admission that one *trafficked in* the drug, or that an admission that one *knew* people suspected of drug trafficking is not tantamount to an admission that one *engaged in drug trafficking* with them. Petitioner's appreciation of these distinctions is demonstrated by his second statement, in which he cited his drug use to deflect the suggestion that he had obtained methamphetamine in order to distribute it. Indeed, petitioner's basic defense at trial was that he was a methamphetamine user, not a methamphetamine distributor. See, *e.g.*, 1 Trial Tr. 50-51; 4 Trial Tr. 725. Moreover, the fact that petitioner repeatedly lied during the jailhouse interview about having sold methamphetamine, and lied about the purposes for which he had given others money, is an indication he was not speaking as a result of psychological pressure arising from his earlier statement, but because he wished to give police the most favorable explanation for his activities.

Third, there is no evidence that the officers attempted to exploit petitioner's first statement in order to obtain the second. There is no indication that the officers even mentioned the first statement to petitioner during the jailhouse interview, or reminded him of particular statements he had made, let alone that they attempted to convince petitioner that he had nothing more to lose by providing a full account of his actions. See *Elstad*, 470 U.S. at 316 (in holding subsequent statements admissible, noting that the officers did not "exploit the unwarned admission to pressure respondent into waiving his right to remain silent").

Fourth, petitioner's second statement was preceded by full *Miranda* warnings and a valid written waiver of those rights. See J.A. 9. Petitioner was specifically notified that he did not have to speak with the officers without counsel

present, and confirmed that he understood that warning. Petitioner did not ask to speak to an attorney, nor is there any indication the officers suggested that it would be in his interest not to consult with an attorney before speaking with them. J.A. 77-78. There is therefore no reason to believe petitioner felt that he was under some obligation to explain away his prior statement before consulting with counsel. The valid waiver further diminishes any likelihood that petitioner was induced to speak by the knowledge that he already had made a statement to the officers. See *Rawlings*, 448 U.S. at 107 (fact that "petitioner received *Miranda* warnings only moments before he made his incriminating statements" is "important * * * in determining whether the statements at issue were obtained by exploitation of" a constitutional violation). Thus, based on all of the relevant factors, petitioner's decision to speak with the officers at the jailhouse was "an act of free will [sufficient] to purge [any] primary taint." *Kaupp*, 123 S. Ct. at 1847 (second bracketed word added) (quoting *Wong Sun*, 371 U.S. at 486).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2003

GRANTED

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No. 02-6320

IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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This case is about the *Sixth* Amendment. At issue is whether agents of the state may ferret out inculpatory information from a defendant in a criminal case at a time when he is entitled to the advice of a lawyer in his dealings with the prosecution, and what they may then do once they obtain that information. At stake is the fairness of the adversary system of justice, which the Constitution safeguards by securing to each accused the right to the assistance of counsel. Although the inculpatory information was unlawfully obtained in this case by the police while petitioner was in custody, this is not a *Miranda* case, and the issues do not turn on any claim of coercion or compelled self-incrimination. Notwithstanding the government's attempts to elide the distinction between *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Massiah* v. *United States*, 377 U.S. 201 (1964), the Constitution's guarantee of the assistance of counsel for those who have been formally accused of a crime does not reside in the Fifth Amendment, or even the Fifth and a Half Amendment. It resides in the Sixth Amendment.

I. THE OFFICERS VIOLATED THE SIXTH AMENDMENT WHEN THEY DELIBERATELY ELICITED A POST-INDICTMENT INCULPATORY STATEMENT FROM PETITIONER IN THE ABSENCE OF COUNSEL.

"[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985). Under this standard, the crucial question is whether the officers "deliberately elicited" an inculpatory statement from petitioner when they arrived at his home, after he was indicted, and told him that they wanted to "discuss" the charges against him. *Massiah*, 377 U.S. at 206. State officers "deliberately elicit" statements from defendants when they "intentionally creat[e] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *United States* v. *Henry*, 447 U.S. 264, 274 (1980); *see also Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986) ("action, beyond merely

listening, that [is] designed deliberately to elicit incriminating remarks").

The findings of fact made by the magistrate judge and adopted by the district court make clear that the arresting officers did deliberately elicit an incriminating response from petitioner at his home. The magistrate judge specifically found that Deputy Bliemeister's conduct was "designed to elicit a response." J.A. 103. The magistrate thus declined to credit Bliemeister's testimony that he did not expect petitioner to respond to his invitation to "discuss" the charges (J.A. 56) and concluded instead, "I don't know how [Bliemeister's statement] could be anything except designed to elicit a response." J.A. 103; *see also* J.A. 103-04 ("I cannot believe that [the] mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find."). Having witnessed the officers' live testimony, the magistrate was uniquely well-positioned to make this determination, and his findings are entitled to deference on appeal. *See Miller* v. *Fenton*, 474 U.S. 104, 114 (1985) ("When ... the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight."); *Thompson* v. *Keohane*, 516 U.S. 99, 111 (1995) (same).

The record amply supports the magistrate's finding that Bliemeister's actions were designed to elicit an incriminating response. Bliemeister told petitioner that the purpose of the officers' visit was "to discuss" petitioner's alleged involvement in methamphetamine use and distribution—a clear invitation to petitioner to talk to the officers about those subjects. The government strives to argue that, "[t]aken in context, the record indicates that Bliemeister merely used colloquial language to inform petitioner that he wished to tell petitioner about the charges that he faced," and that "[t]he officers' conduct was ... inconsistent with any effort to elicit incriminating statements." Gov't Br. 18-19. This rationalization cannot be squared with the facts.

First, the officers' own testimony contradicts the government's claim that Bliemeister used the term "discuss" to signify only that he intended to *explain* the charges in the indictment *to* petitioner, without expecting any response. On cross-examination, Bliemeister admitted that "the first thing [he] told [petitioner] was that [he] needed *to discuss with* [petitioner] his involvement in the use and distribution of methamphetamine." J.A. 45 (emphasis added). Detective Garnett similarly confirmed that Bliemeister used "[w]ords to [the] effect" that the officers "were there *to discuss with* [petitioner] his involvement in the use and distribution of methamphetamine." J.A. 83 (emphasis added). The magistrate judge thus found that Bliemeister told petitioner "that the purpose of [the officers'] visit was *to discuss with* [petitioner] his role in methamphetamine use and distribution." J.A. 102 (emphasis added); *see* J.A. 103 (describing Bliemeister's statement as "we need *to talk with you* ... or we want *to talk with you* about your involvement in methamphetamine distribution or use" (emphasis added)). Although the government seizes on secondary definitions of the word "discuss" to offer an alternative interpretation in hindsight, the record makes clear that Bliemeister used the term "discuss" in its conventional sense: to engage in a conversation, not to give a lecture. *See The American Heritage Dictionary of the English Language* 517 (4th ed. 2000) ("1. To speak with another or others about; talk over."); Gov't Br. 18 (citing similar primary definition).

Although the government attempts to portray Bliemeister's "discuss" statement as a routine explanation of charges required by the Federal Rules of Criminal Procedure (Br. 15), the officers admitted they were not trained to preface an arrest with such a statement. *See* J.A. 56, 85-86. If the officers had shared the government's understanding of their conduct as routine behavior required by federal law, one would expect them to have testified that they were trained to inform defendants of the need to "discuss" pending charges when making an arrest. *See* Fed. R. Crim. P. 4(c)(3)(A).

Moreover, Bliemeister had used similar language in a prior encounter with petitioner when it was also clear that he was conducting an investigation, not reciting allegations. In March 1999, Bliemeister and another officer went to petitioner's home to conduct an investigative technique described as a "knock and talk." J.A. 20. During that earlier encounter, the officers informed petitioner of accusations they had received from an unknown caller concerning petitioner and told him that they "wanted to discuss these allegations with him." J.A. 44; *see also* J.A. 19-20, 42-44. Given the similarity of the 1999 and 2000 confrontations and of the language employed on each occasion, the most natural conclusion is that the officers had the same investigative purpose in proposing "to discuss" relevant criminal allegations with petitioner in both instances. Aware that petitioner had previously responded to police entreaties to "discuss" allegations of criminal activity, Bliemeister relied on the likelihood that the same form of inquiry would succeed the following year with petitioner. But on the second occasion, petitioner was a party to a criminal case and thus entitled under the Sixth Amendment to the assistance of counsel at any such discussions—a right the officers did not honor.

II. THE TRADITIONAL DERIVATIVE-EVIDENCE RULE—NOT THE RULE OF *OREGON* v. *ELSTAD*—GOVERNS THIS CASE.

This Court has consistently ruled that evidence obtained directly through unconstitutional conduct, along with all evidence derived therefrom, must be excluded from a defendant's criminal trial.[1] In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court ruled that, when the only police misconduct present is an inadvertent failure to give the full warnings

[1] *See Wong Sun* v. *United States*, 371 U.S. 471, 484-85 (1963) (Fourth Amendment); *Brown* v. *Illinois*, 422 U.S. 590, 597-600 (1975) (same); *Kastigar* v. *United States*, 406 U.S. 441, 453-54, 461-62 (1972) (Fifth Amendment); *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2001-02 (2003) (plurality opinion) (same); *United States* v. *Wade*, 388 U.S. 218, 239-41 (1967) (Sixth Amendment); *Nix* v. *Williams*, 467 U.S. 431, 441-43 (1984) (same).

required by *Miranda*, derivative evidence in the form of a subsequent confession by the defendant may be admitted so long as that confession has been preceded by *Miranda* warnings and has been knowingly and voluntarily made. *See id.* at 309. *Elstad*, however, has no application to this case, because the evidence at issue here was derived from state conduct that violated the Sixth Amendment.

A. This Court Has Consistently Held That Fruits Of Evidence Obtained Through Unconstitutional Out-Of-Court Conduct Must Be Suppressed.

At the time of the *Elstad* decision, this Court had already held the derivative-evidence rule applicable in Fourth, Fifth, and Sixth Amendment cases. *See supra*, p. 4 n.1. In *Elstad*, the Court declined to extend the full scope of the derivative-evidence rule to cases involving only a *Miranda* violation. *See* 470 U.S. at 306-09. The Court based its decision squarely on the distinction between a "*Miranda* violation" resulting from a failure to give the required warnings and a "Fifth Amendment violation" involving actual coercion of a confession from a suspect. *Id.* at 306. Absent an "actual infringement of the suspect's constitutional rights," the Court found no basis for application of "the doctrine . . . that fruits of a constitutional violation must be suppressed." *Id.* at 308; *see also id.* at 309 ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").

The government now apparently seeks to revise the rationale of *Elstad*, and intimates (without expressly arguing) that the Court declined to apply the derivative-evidence rule in that case because no constitutional violation was complete until the defendant was brought to trial. The government then draws an analogy to the Sixth Amendment context by arguing that a Sixth Amendment violation is not established until the government introduces *at trial* evidence deliberately elicited from a criminal defendant lacking the assis-

tance of counsel. *See* Gov't Br. 25-30. But the timing of the "completion" of the violation was not the basis of the Court's decision in *Elstad*. Indeed, the Court stated that the traditional derivative-evidence rule would have applied had it been shown that the police officers coerced the defendant's first confession. *See* 470 U.S. at 306-09; *see also Chavez* v. *Martinez*, 123 S. Ct. 1994, 2002 (2003) (plurality opinion).

Nor has the Court ever suggested that the extent to which derivative evidence must be excluded from a defendant's trial turns on whether the relevant constitutional violation is considered complete prior to trial. The Court recently confirmed that a violation of the Self-Incrimination Clause is not complete until trial, *see Chavez*, 123 S. Ct. at 2001, 2004 (plurality opinion); *id.* at 2006 (Souter, J.), yet also made clear that, whether or not a compelled statement is ultimately admitted at trial, the Constitution requires the exclusion of all evidence *derived from* that statement. *See id.* at 2001-02; *see also United States* v. *Hubbell*, 530 U.S. 27, 37 (2000). The Court's immunity cases similarly hold that the evidentiary consequences of compelled self-incrimination can be determined prior to trial and that, under the Fifth Amendment, *neither* testimony that was compelled from a witness under a grant of immunity *nor* any evidence derived from that testimony may be used in any way against the immunized witness. *See, e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 453-54, 457-59 (1972); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

This Court has analyzed derivative-evidence questions in a similar way under the Sixth Amendment's Counsel Clause. The Court has never held that the extent to which derivative evidence must be excluded from a defendant's trial turns on whether a violation of the Counsel Clause is considered complete prior to trial. Rather, the Court has applied (and presumed the application of) the derivative-evidence rule even when the evidence in question derived from a *pretrial*, out-of-court encounter with a defendant.

For example, in *United States* v. *Wade*, 388 U.S. 218, 239-41 (1967), where government officers conducted a pre-

trial lineup with the indicted defendant outside the presence of counsel, the Court held that the admissibility of a subsequent courtroom identification must be analyzed under the derivative-evidence rule. Similarly, in *Nix* v. *Williams*, 467 U.S. 431 (1984), where officers deliberately elicited an out-of-court statement from the arraigned defendant outside the presence of counsel, the Court explained that the traditional derivative-evidence rule applied to "violations ... of the Sixth Amendment as well as of the Fifth Amendment" (*id.* at 442 (citation omitted)), and determined the admissibility of the derivative physical evidence at issue under the inevitable-discovery exception to the derivative-evidence rule. *See id.* at 443-50. Thus, the Court's cases make clear that the constitutionally proscribed means of obtaining evidence for use against a defendant (e.g., a lineup or deliberate elicitation of an incriminating statement outside the presence of counsel) carries with it a derivative-evidence exclusionary rule. The government's arguments about when a Sixth Amendment violation is complete are wide of the mark.[2]

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[2] In any event, the government errs in contending (Br. 25) that this Court has held that a Sixth Amendment violation does not occur unless the evidence obtained in an uncounseled encounter "is used against the defendant at trial." The government relies principally on *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), but that case held only that no claim under 42 U.S.C. § 1983 would lie based solely on the fact that an undercover agent had participated in discussions between a defendant and his attorney. The Court did *not* suggest that the Sixth Amendment would have been violated only if the undercover agent had testified at trial. In fact, the Court stated:

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554; *see also United States* v. *Morrison*, 449 U.S. 361, 364-65 (1981).

In *Elstad*, the Court distinguished between a confession obtained in violation of *Miranda* and a coerced confession obtained in violation of the Constitution. In the former case, the confession is suppressed not because its admission *necessarily* would violate the Fifth Amendment, but as a constitutional prophylaxis because courts cannot reliably distinguish between voluntary and involuntary confessions obtained by police during custodial interrogation. *See Elstad*, 470 U.S. at 306-07; *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). In the case of a coerced confession, the defendant's statement must be suppressed because its admission at trial *necessarily* would violate the Fifth Amendment. *See Elstad*, 470 U.S. at 306-07; *Chavez*, 123 S. Ct. at 2002. For the *Elstad* Court, the applicability of the derivative-evidence rule turned on this distinction between the bases for exclusion. *See* 470 U.S. at 306-09.

Similarly, the exclusion of a statement that officers of the state deliberately elicit from an uncounseled defendant is mandated by the Constitution, not by a prophylactic rule that sweeps more broadly than the Sixth Amendment.[3] In this case, officers of the state deliberately elicited an uncounseled post-indictment statement from petitioner. Accordingly, the Sixth Amendment requires the exclusion of the statement obtained at petitioner's home, and the predicate for application of the derivative-evidence rule (a constitutional violation) has been established.

[3] Indeed, the Court has characterized the deliberate elicitation of inculpatory statements from an uncounseled defendant as a violation of the Sixth Amendment, just as it described coercion of a confession in *Elstad* as a violation of the Fifth Amendment. *Compare, e.g.*, *Texas* v. *Cobb*, 532 U.S. 162, 168-69 (2001) ("police had violated the suspect's Sixth Amendment right to counsel") *and Moulton*, 474 U.S. at 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.") *with Elstad*, 470 U.S. at 309 ("police infringement of the Fifth Amendment itself").

B. The Rationale Of *Elstad* Is Limited To The Fifth Amendment Context.

Elstad is distinguishable for a second reason: it addresses only what is necessary to ensure that a defendant's rights under the *Fifth* Amendment are not violated. The government has attempted to transmute this case into a Fifth Amendment dispute, repeatedly pleading the voluntariness of petitioner's intervening waiver and jailhouse confession as bases for applying *Elstad* here. This case, however, arises under the Sixth Amendment. The Court's identification of a rule in *Elstad* to "satisf[y]" "the Fifth Amendment proscription against use of compelled testimony" therefore does not govern here. 470 U.S. at 318. The admissibility of petitioner's jailhouse confession must instead be resolved by consideration of the "distinct policies and interests" underlying the Sixth Amendment. *Brown* v. *Illinois*, 422 U.S. 590, 602 (1975).

Relying on *Patterson* v. *Illinois*, 487 U.S. 285 (1988), the government argues that *Elstad*'s holding adequately serves the Sixth Amendment as well. Specifically, the government contends (Br. 23) that *Patterson* and *Elstad* together support the proposition that, notwithstanding the prior deliberate elicitation of a post-indictment statement in the absence of counsel, "[f]ollowing a defendant's voluntary, knowing, and intelligent waiver of counsel, his statements should be held admissible." The government overreads both decisions. The waiver at issue in *Patterson* was not preceded by government misconduct of any kind. *See* 487 U.S. at 287-89. The Court thus had no occasion to establish a standard for the admissibility of derivative evidence when government officers first deliberately and unconstitutionally elicit an uncounseled post-indictment statement.

Elstad does not fill the gap left in the government's *Patterson* argument. The Court did state in *Elstad* that the admissibility of the defendant's second confession in that case turned on whether the statement was preceded by proper *Miranda* warnings and "knowingly and voluntarily made." 470 U.S. at 309. But that holding applied only in the

specific context of that case, in which the officers' elicitation of the first confession amounted to merely a *Miranda* violation—and not, in the Court's words, a "police infringement of the Fifth Amendment itself." *Id.* The Court did not hold (as would be necessary to provide a successful parallel for the government's waiver argument here) that a *Miranda* waiver following closely in time upon an "infringement of the Fifth Amendment itself" would similarly suffice to render a subsequent confession admissible. In fact, the Court stated precisely the opposite in *Elstad*: if government officers coerce an initial confession from a defendant, the admissibility of a subsequent warned confession turns on the extent to which the Fifth Amendment taint from the prior coercion remains. *See id.* at 310.

When police officers elicit a voluntary confession from a suspect (even if they fail to comply in all respects with *Miranda*), the subsequent administration of *Miranda* warnings generally ensures that a confession given thereafter is voluntary, and thereby addresses the central concern of the Fifth Amendment. That is the basis of the *Elstad* decision. *See* 470 U.S. at 310-11. But voluntariness is not the focus of the Sixth Amendment's Counsel Clause, and transplantation of the limited *Elstad* rule into the Sixth Amendment context would undermine the distinct policies and interests underlying the Counsel Clause. The Counsel Clause is founded upon the Framers' recognition that "the average defendant does not have the professional legal skill to protect himself" in a criminal prosecution, when faced with the full array of resources available to the state. *Moulton*, 474 U.S. at 169 (internal quotation marks omitted). The primary purpose of the Counsel Clause is "to minimize imbalance in the adversary system" by providing "a spokesman for, or advisor to, the accused." *United States* v. *Ash*, 413 U.S. 300, 309, 312 (1973). The guarantee of counsel's assistance protects the accused from his own "lack of familiarity with the law." *Id.* at 317; *see also McNeil* v. *Wisconsin*, 501 U.S. 171, 177-78 (1991).

When police officers deliberately and successfully elicit a post-indictment confession from an uncounseled criminal defendant, subsequent *Miranda* warnings from the same police officers are insufficient by themselves to ensure that the central concerns of the Sixth Amendment are vindicated. The warnings do not afford the defendant "the professional legal skill" (*Moulton*, *supra*) necessary to understand the situation into which the government's misconduct has thrust him. They do not inform the defendant, as counsel would, of the legal rules surrounding the admissibility of the prior, deliberately elicited statement. Nor do the *Miranda* warnings provide the defendant the necessary legal advice regarding the true consequences of making an additional statement in these circumstances. There is accordingly a heightened danger that the defendant will decide to make a second statement based upon a lack of familiarity with his legal rights. In short, while the *Miranda* warnings may ensure the removal of any Fifth Amendment taint remaining from a prior *Miranda* violation, the warnings by themselves do little to alleviate the distinct Sixth Amendment taint from the elicitation of a prior uncounseled statement.

Relying on *Elstad*, the government denies (Br. 33-34) that an accused who has made an initial, uncounseled confession may be meaningfully influenced to make another confession by the (erroneous) belief that he has little to lose, and potentially much to gain, through further self-incrimination. But numerous decisions of this Court recognize that defendants' actions are influenced in exactly this way.[4] *Elstad* did not question these cases. *Elstad* did not hold (as the government seems to suggest) that, as a matter of law, a defendant's first confession never has a causal connection to his willingness to make a second confession. *Elstad* held only

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[4] *See, e.g., Dunaway* v. *New York*, 442 U.S. 200, 218 n.20 (1979); *Brown*, 422 U.S. at 605 & n.12; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947); *cf. Darwin* v. *Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part, dissenting in part).

that this connection does not rise to the level of Fifth Amendment "compulsion." 470 U.S. at 314.[5]

The fact that a defendant who has made an inadmissible first confession is meaningfully influenced by his ignorance of his legal rights to make a second confession is, however, a Sixth Amendment concern. Once the government deliberately elicits a post-indictment statement from an uncounseled defendant, it should be precluded from using that statement thereafter to obtain an additional related confession until there is some assurance that the equality of the adversarial encounter has been restored and the defendant understands the consequences of further self-incrimination.

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[5] As we acknowledged in our opening brief (at 24-25), *Elstad* did describe as "speculative and attenuated" the causal connection between *that defendant's* making of his first, unwarned confession and his ultimate decision to make a second warned statement. 470 U.S. at 313-14. But that statement was offered as support for the Court's ultimate ruling that "the mere fact that a suspect has made an unwarned admission does not warrant a *presumption of compulsion*," *id.* at 314 (emphasis added), and must be understood in that context. The Court did not purport to hold more broadly that a defendant's initial confession to the police can never influence his subsequent behavior in an encounter with the government, and had no reason to so hold. To do so now would ignore the teachings of law enforcement. Police interrogation manuals specifically counsel officers to press the psychological advantage gained once a suspect has given a confession. *See* Pet. Br. 21 (citing interrogation manual). In another case pending before the Court, *Missouri* v. *Seibert*, No. 02-1371, a police officer confirmed that institutes train officers to interrogate suspects in two stages—first, in the absence of counsel and without a warning of the right to counsel and then, once incriminating admissions have been obtained, a second time with the administration of proper *Miranda* warnings. *See Missouri* v. *Seibert*, 93 S.W.3d 700, 702-04 (Mo. 2002). An *amicus* brief submitted in *Seibert* by former prosecutors, judges and law enforcement officers explains (at 15-16) that the two-stage interrogation technique "is effective," and that "[e]veryone in law enforcement knows that the purpose of [it] is to soften up the suspect and increase the likelihood that she will not invoke her rights once warnings are belatedly given." FBI agents similarly have recognized the incentives for officers to engage in this tactic. *See* Kimberly A. Crawford, *Intentional Violations of Miranda: A Strategy for Liability*, Law Enforcement Bull. (Aug. 1997), *available at* http://www.fbi.gov/publications/leb/1997/aug976.htm.

To the extent there is any uncertainty regarding the cause of a second confession, the government, having "meddle[d]" with "[t]he springs of conduct" through its wrongful actions, bears the burden of demonstrating "that its illegal action did not induce" the subsequent confession. *Harrison* v. *United States*, 392 U.S. 219, 224-25 (1968).

The government incorrectly argues (Br. 35) that *Elstad* found the causal connection between the making of an initial inculpatory statement and a second such statement "too speculative to serve as the foundation for a finding that [the] second warned statement is the fruit of [the] first unwarned statement." The Court in *Elstad* addressed the defendant's challenge to the voluntariness of his second confession only *after* it decided that the "fruits of the poisonous tree" rule was not applicable. *Compare* 470 U.S. at 303-09 (applicability of fruits rule), *with id.* at 309-14 (voluntariness argument). Because the Court had already found the traditional "fruits" rule not to be applicable *at all*, it had no occasion to determine whether a warned statement could or could not be a "fruit" of a prior, unwarned statement.

Indeed, if *Elstad* had held that a warned confession could never be a "fruit" of a prior confession, the decision would have contradicted the Court's prior cases on the identical issue. For example, in *Brown*, the Court held that the defendant's second statement (which was preceded by *Miranda* warnings) "was clearly the result and the fruit of the first," reasoning that the defendant's belief in the admissibility of his first statement "bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." 422 U.S. at 605 & n.12. The Court later relied on this precise portion of its *Brown* decision, applying it to the same effect in *Dunaway* v. *New York*, 442 U.S. 200, 219 n.20 (1979). *United States* v. *Bayer*, 331 U.S. 532 (1947), also did not reject the possibility that a confession can be the "fruit" of a prior confession. To the contrary, *Bayer* expressly recognized that because of "the psychological and practical disadvantages of having confessed," a subsequent confession *can* be regarded as a "fruit"

of the first, but also held that the confessor is not "perpetually disable[d]" from making a usable confession. *Id.* at 540-41. Only after considering the specific facts of that case—including the lapse of six months between confessions and the administration of a *Miranda*-like warning—did the Court hold the second confession admissible. *See id.* at 541. In sum, *Elstad*, which was decided under the Fifth Amendment, provides no precedent for recognizing an exception to the traditional derivative-evidence rule in the Sixth Amendment context presented here.

C. No Other Reason Justifies Admission Of A Subsequent Confession Upon Proof Of A *Miranda* Waiver Alone.

1. The government further argues (Br. 36-43) that, even if petitioner's second confession is in fact the fruit of the initial Sixth Amendment violation, the admissibility of the second confession is nonetheless controlled by the *Elstad* rule—*viz.*, if the statement was preceded by *Miranda* warnings and was knowingly and voluntarily made, then it is admissible. This Court has never applied such a rigid rule in its derivative-evidence cases. The attenuation of the taint from a constitutional violation turns on all the surrounding circumstances, not an algorithm.

Thus, in a line of Fourth Amendment cases beginning with *Brown* v. *Illinois*, the Court has consistently held that "[t]he *Miranda* warnings, *alone* and *per se*, cannot always make the [decision to confess] sufficiently a product of free will to break . . . the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603; *see Kaupp* v. *Texas*, 123 S. Ct. 1843, 1847 (2003) (*per curiam*) (same). Rather, the Court also has examined the temporal proximity of the unconstitutional conduct to the defendant's statement, the presence of intervening circumstances, and the purpose and flagrancy of the government's misconduct. *See Kaupp*, 123 S. Ct. at 1847; *Brown*, 422 U.S. at 603-04. In the Fifth Amendment context—indeed, in *Elstad* itself—the Court held that the admissibility of a confession following an earlier coerced confession depended upon a number of factors,

including "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators." 470 U.S. at 310.[6] And in the Sixth Amendment case of *Wade*, which concerned the admissibility of a courtroom identification that followed an earlier uncounseled lineup, the Court applied the derivative-evidence rule and articulated several factors for determining whether "the evidence . . . has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint," including "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, . . . and the lapse of time between the alleged act and the lineup identification." 388 U.S. at 241 (internal quotation marks omitted).

The government attempts to distinguish the *Brown* line of cases by arguing that a Fourth Amendment violation is completed at the time of the unreasonable search or seizure, and thus the *Miranda* warnings cannot "cure" a Fourth Amendment violation. *See* Gov't Br. 36-38. But there is no indication in those cases that the timing of a Fourth Amendment violation was at all relevant to their holdings. In addition, the Court has never found this distinction to justify limiting the Fourth Amendment derivative-evidence cases to their particular context. The Sixth Amendment decisions in *Wade* and *Nix* both relied on and applied *Wong Sun* v. *United States*, 371 U.S. 471 (1963). *See Nix*, 467 U.S. at 441-42; *Wade*, 388 U.S. at 241. And as we showed in our opening brief (pp. 18-19), the differences between the Fourth and Sixth Amendments justify, if anything, a more stringent derivative-evidence rule under the Sixth Amendment.

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[6] When the government compels a person to testify under a grant of immunity, the Court has erected an even higher barrier to the admission of derivative evidence, requiring the government to "show[] that [its] evidence is not tainted by establishing that [it] had an independent, legitimate source for the disputed evidence." *Murphy*, 378 U.S. at 79 n.18; *see also Kastigar*, 406 U.S. at 460 (same).

2. The government also contends (Br. 40-43) that the costs of applying the traditional derivative-evidence rule in the Sixth Amendment context would outweigh its benefits. But precisely the opposite is true: application of the *Elstad* rule in place of the traditional derivative-evidence rule would significantly burden defendants' Sixth Amendment rights without yielding sufficient societal benefits in return.

As the Court has recognized in the Fourth Amendment context, a blanket rule that *Miranda* warnings are sufficient to break the link between unconstitutional conduct and a subsequent confession "eviscerate[s]" any incentive for government officers to avoid the improper conduct in the first instance, "making the warnings, in effect, a 'cure-all.' " *Brown*, 422 U.S. at 602. That conclusion is even more apt with respect to the Sixth Amendment. To admit a deliberately elicited, uncounseled, post-indictment statement against the defendant at trial in cases involving *no* preceding Sixth Amendment violation, the prosecution already must show that a defendant waived his right to counsel and made his statement voluntarily. *See, e.g., Patterson*, 487 U.S. at 292 (waiver); *Dickerson*, 530 U.S. at 434 (voluntariness). The government now advocates using exactly the same rule—proof of a waiver followed by a voluntary statement—to determine the admissibility of a confession derived from an earlier Sixth Amendment violation. In the government's view, nothing should be changed by the fact that it has violated the Constitution.

Because, under the government's submission, admissibility of a confession would be governed by the same rule in both instances, officers would have no incentive to observe the commands of the Sixth Amendment. They would, however, have a powerful incentive to meet with indicted defendants in the absence of counsel to "discuss" incriminating information with them. If the interview proves not to be useful, nothing is lost through the effort. But if the interview is fruitful, a simple administration of the *Miranda* warnings (which would have been required in any event had the officers simply obeyed the Constitution in the first instance) followed by a renewed discussion with the defendant of the useful incriminating statements (and potentially more) would secure the admissibility of the evidence for trial. That is, of course, precisely what occurred in this case.

The government incorrectly asserts (Br. 41) that "deterrence has only an attenuated role to play in this context." Not only has this Court never suggested that the deterrence rationale for the derivative-evidence rule is inapplicable in the Sixth Amendment context, but, in fact, it has recognized that deterrence is highly pertinent. In *Nix*, 467 U.S. at 442-43, after noting that it had held the derivative-evidence rule applicable in Sixth Amendment cases, the Court explained that one of the rule's primary rationales is the need "to deter police" from unconstitutional conduct. The Court then based its decision on the inevitable-discovery exception largely on its consideration of whether the deterrence rationale would be served by exclusion. *See id.* at 444.[7]

Finally, the government's argument (Br. 40-41, 43) that it is desirable for the police to obtain and use fruits of Sixth Amendment violations, as long as *Miranda* warnings intervene, again improperly conflates the values underlying the Fifth and Sixth Amendments. The admission of an "uncoerced confession[]" (*id.* at 43) may be desirable when the only potential objection is grounded in the Fifth Amendment. But the Sixth Amendment regularly precludes the

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[7] Contrary to the government's suggestion (Br. 41), *Massiah* does not hold that police officers are free to deliberately elicit post-indictment statements from uncounseled defendants so long as the evidence is not used at trial. The Court rejected that reading of its *Massiah* decision in *Arizona* v. *Roberson*, 486 U.S. 675 (1988), where it described the relevant passage from *Massiah* as holding only "that the continuing investigation of *uncharged offenses* did not violate the defendant's Sixth Amendment right to the assistance of counsel." *Id.* at 685 (emphasis added). The Court similarly explained in *Moulton*, 474 U.S. at 179-80, that "[t]he police have an interest in the thorough investigation of crimes for which formal charges have already been filed. . . . In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused." *See also Cobb*, 532 U.S. at 170-71.

admission of voluntarily-made, incriminating statements. *See, e.g., Massiah*, 377 U.S. at 201-03, 206. When the government exploits a confrontation with an uncounseled defendant to obtain evidence, the use of that evidence against the defendant undermines the values of the Sixth Amendment and the integrity of any trial at which the evidence is admitted. The assistance of counsel guaranteed by the Sixth Amendment is thus "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

III. The Government Cannot Sustain Its Burden To Prove Attenuation Of The Taint.

Properly applied, this Court's traditional derivative-evidence rule requires the exclusion of petitioner's jailhouse confession from his trial. The government argues (Br. 43-48) that the "courteous" nature of the officers' encounter with petitioner at his home and the fact that they did nothing to overbear his will during that visit should render the subsequent jailhouse confession admissible. Once again, the government's focus on Fifth Amendment principles of voluntariness is misplaced. The Court has repeatedly rejected similar arguments, which "betray[] a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in *Brown*." *Dunaway*, 442 U.S. at 219; *see also Taylor* v. *Alabama*, 457 U.S. 687, 693 (1982).

In fact, the taint from the officers' violation of the Sixth Amendment was never purged in this case. It was not dissipated by the passage of only thirty minutes between petitioner's two confessions, during which the officers maintained custody of petitioner. Such a short time could not "possibly have contributed to [petitioner's] ability to consider carefully and objectively his options and to exercise his free will." *Taylor*, 457 U.S. at 691.[8] Nor was there "any

[8] The government's reliance on *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), is misplaced. The Court concluded there that the forty-five-minute period between the illegal restraint and the defendant's confession did not justify suppression of the confession because the Fourth Amendment violation involved no "strict[] . . . custodial conditions." *Id.* at 107. Moreover, the post-*Miranda* confession in *Rawlings* was a "spontaneous reaction[]" to the discovery of incriminating evidence—unlike this case, where the second confession clearly resulted from police questioning. *Id.* at 108. Finally, *Rawlings* also was based on the officers' good-faith belief that they had complied with the Constitution. *See id.* at 109-10. As we explain below, that premise is absent here.

meaningful intervening event" that might justify the conclusion that the Sixth Amendment taint of the first confession had been effectively dissipated. *Kaupp*, 123 S. Ct. at 1848 (internal quotation marks omitted). In particular, no steps were taken to ensure that petitioner understood the true consequences of a decision to further incriminate himself at the jailhouse, after having made a first inadmissible confession at his home.

The "purpose and flagrancy of the [officers'] misconduct" (*Brown*, 422 U.S. at 604) at petitioners' home further supports suppression of his jailhouse confession. The officers' deliberate effort to engage petitioner in conversation on the charges in the pending indictment was a patent violation of the Sixth Amendment.[9] This case presents no difficult issues of Sixth Amendment law that the officers can be excused for having misunderstood and, in any event, the officers never claimed to have believed that they were complying with the Sixth Amendment. Their conduct was a clear violation of *Massiah* and should not be rewarded.

The link between the first and second confessions is unmistakable. In the first statement, the officers elicited admissions on three subjects that they subsequently reviewed (and re-elicited) at the station house: that petitioner previously had been a user of methamphetamine; that he had (during the same period) associated with the persons alleged to have been his co-conspirators; and that he had (again dur-

[9] The government's contention (Br. 45) that the officers were merely negligent in choosing the wrong word (discuss) to convey their purpose is refuted by the magistrate's findings of historical fact. *See supra*, pp. 2-4.

ing the same period) been subject to a number of personal and financial problems. *See* J.A. 18, 21, 29-33, 35-36, 46-48, 51-52, 73, 79-80, 87, 89.

The officers then followed textbook policy (literally) in exploiting those admissions to obtain a more elaborated confession at the jailhouse. It would have been entirely reasonable for a nonlawyer such as petitioner to have thought that, because he had already admitted to the police that he was a methamphetamine user and that he had associated with the alleged co-conspirators during the time of the alleged conspiracy, it was incumbent upon him to respond to the officers' jailhouse questions asking for additional details. A lawyer, of course, could have advised petitioner that the initial statement could be suppressed and that it might well be to his advantage to remain silent. The government in this case exploited its advantage over an uncounseled defendant lacking legal knowledge and skill. That is exactly what the Sixth Amendment is intended to prevent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*[1]

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession, dedicated to the promotion of a fair system of justice. The ABA's more than 400,000 members include prosecutors, public defenders, private attorneys, state and federal trial and appellate judges, legislators, law professors, law enforcement and corrections personnel, law students, and nonlawyer "associates" in allied fields. Since its inception, the ABA has actively promoted improving the administration of justice and increasing the availability and quality of legal counseling to those who need it.

The ABA respectfully submits this brief *amicus curiae* because both of the questions presented by this case implicate matters addressed by the Standards for Criminal Justice promulgated by the ABA. The Standards are widely referenced, including by this Court, as a guide to criminal justice administration. They have been developed, refined, and approved over more than thirty years by task forces of the ABA made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wider and diverse membership of the ABA. As Chief Justice Warren Burger wrote in the Introduction to the First Edition, in his view the Standards project should be regarded as "the single most comprehensive and probably the most monumental

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[1] No counsel for any party authored any part of this brief. No persons other than *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

undertaking in the field of criminal justice ever attempted by the American legal profession *in our national history*." Warren Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974) (emphasis added).

As discussed further in Part I, *infra*, the Standards do not purport to set forth the ABA's views on the requirements of the Constitution, including the Sixth Amendment right to counsel. However, they do represent a considered collection of "best practices" for the criminal justice system, aspirational targets that an experienced group of prosecutors, defenders and judges have agreed upon. As such, the Standards have often been referred to by this Court to inform its constitutional analysis. As relevant to this case, the Standards not only aspire towards the greater involvement of defense counsel at the earliest stages of the defendant's detention, they also recognize and address the special role of counsel once the defendant is formally charged. Indeed, even prior to the promulgation of the Standards for Criminal Justice, "previously adopted ABA standards have all emphasized the importance of early appointment [of counsel]." ABA Standards for Criminal Justice 5.1 cmt (1st ed. 1971).

The ABA accordingly respectfully submits that this Court would benefit from this brief *amicus curiae*, which seeks to address the questions presented from the perspective of the Criminal Justice Standards.

ARGUMENT

I. The ABA Criminal Justice Standards Provide Agreed-Upon Views of Experienced Criminal Practitioners, And This Court Has Recognized That They May Inform Constitutional Analysis.

1. The Function and Limits of the ABA Criminal Justice Standards. As set forth in both Defense Function Standard 4-1.1 and Prosecution Function Standard 3-1.1, the Standards for Criminal Justice of the American Bar Association "are

intended to be used as a guide to professional conduct and performance." Standard 4-1.1. The Standards thus do not purport to define the requirements of the Constitution or statutory law. They do, however, present a consensus view of a wide array of criminal practitioners, reached after careful study, of appropriate means of administering the criminal justice system in the fairest manner practicable. As set forth in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

The current iteration of the Standards, the Third Edition (1992), was itself the result of five years of preparation by ABA task forces. The Standards were subject to review and revision at each level of the ABA Criminal Justice Section. They were then further revised in light of comments solicited from a wide variety of expert outside sources, including the U.S. Department of Justice, the ABA Judicial Administration Division, the National Association of Attorneys General, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, and the National Legal Aid and Defender Association. They were then approved by the ABA's general governing body, the House of Delegates.

Thus, the Standards reflect a consensus view of "better practice" (*Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000)) and provide an important guide that may, "depending on all the circumstances" (Standard 4-1.1), inform the constitutional

analysis, including in the Sixth Amendment context. For example, the Court's seminal ruling in *Strickland* v. *Washington*, 466 U.S. 668, 688-89 (1984), recognizes that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like, are guides to determining what [performance of counsel] is reasonable." See also *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000) (applying *Strickland* and citing the Standards). The Court in *Argersinger* v. *Hamlin*, 407 U.S. 25, 39 (1972), similarly relied on the Standards in holding that the Sixth Amendment requires the government to provide defense counsel if an offense may lead to incarceration. Concurring, Chief Justice Burger recognized that the ABA in promulgating the Standards "was not addressing itself, as we must in this case, to the constitutional requirement but only to the broad policy issue." *Id.* at 43.[2] Yet, he explained, the Standards were relevant to the constitutional inquiry because "[t]he right to counsel has historically been an evolving concept," and "[p]art of this evolution has been expressed in the policy preferences of the legal profession itself, and the contributions of the organized bar and individual lawyers – such as those appointed to represent the indigent defendants in the *Powell* and *Gideon* cases – have been notable." *Id.* at 44.

This Court's precedents suggest that consideration of the ABA Standards is particularly appropriate in the Sixth Amendment context. This Court takes a "pragmatic approach" in defining the "scope of the Sixth Amendment right to counsel." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988); see also *id.* at 298 ("[W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at a particular

[2] Accord *Jones* v. *Barnes*, 463 U.S. 745, 753 n.6 (1983) ("the fact that the ABA may have chosen to recognize a given practice as desirable does not mean that practice is required by the Constitution").

proceeding, and the dangers to the accused of proceeding without counsel."); see also *Scott* v. *Illinois*, 440 U.S. 367, 373 (1979) (affirming *Argersinger* because it had "proved reasonably workable").[3] The ABA Standards, which Chief Justice Burger described as "the richest reservoir of experience ever developed concerning the functioning of our criminal justice system," reflect a consensus among the legal community on the practicalities of criminal procedure regarding advice and provision of counsel.

Thus, this Court applied the ABA Standards in the Sixth Amendment case of *Nix* v. *Whiteside*, 475 U.S. 157 (1986). The *Nix* Court relied on the "evolution of the contemporary standards promulgated by the American Bar Association" to conclude that the Sixth Amendment was not violated by counsel's refusal to assist the defendant in presenting perjured testimony at trial. *Id.* at 170 n.6. See also *Caldwell* v. *Mississippi*, 472 U.S. 320, 334 n.6 (1985) (citing the ABA Standards in holding unconstitutional statements made in prosecutor's closing argument); cf. *Moran* v. *Burbine*, 475 U.S. 412, 440 (1986) (Stevens, J., dissenting) (noting that "this Court frequently finds helpful" the ABA Standards for Criminal Justice; citing *Nix* and *Caldwell*, *supra*).[4]

For these reasons, federal and state courts at all levels regularly cite the ABA's Criminal Justice Standards as persuasive authority with respect to an array of questions relating to the proper functioning of the criminal justice

[3] See also *McNeil* v. *Wisconsin*, 501 U.S. 171, 183 (1991) (Kennedy, J., concurring); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986); *Strickland* v. *Washington*, 466 U.S. 668, 696 (1984); *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

[4] For more examples of consideration by this Court of the ABA Standards, see, e.g., *Michigan* v. *Harvie*, 494 U.S. 344, 364 n.8 (1990); *McCoy* v. *Court of Appeals*, 486 U.S. 429, 436 n.8 (1988); *Ake* v. *Oklahoma*, 470 U.S. 68, 81 n.7 (1985); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 n.10 (1984); *Bearden* v. *Georgia*, 461 U.S. 660, 669 n.10 (1983).

system. In addition to the decisions of this Court cited *supra*, see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 322 n.48 (2001); *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989). For recent decisions in the federal courts of appeals, see, *e.g.*, *United States* v. *Leonti*, 2003 U.S. App. LEXIS 7727, at *22 (CA9 2003) (professional responsibility); *Mitchell* v. *Mason*, 2003 U.S. App. LEXIS 6511, at *41 n.6 (CA6 2003) (same); *Roccisano* v. *Menifee*, 293 F.3d 51, 60 (CA2 2002) (effective assistance of counsel).

2. The Standards Recognize, As Does This Court, The "Essential" Character of the Right to Counsel. The ABA Defense Function Standards highlight the importance of the right to counsel to the administration of the criminal justice system and, in that basic and important respect, are consistent with this Court's Sixth Amendment precedents and with the historical development over two-hundred-plus years of the Sixth Amendment right to counsel. The right to counsel conferred upon defendants is, in the words of Standard 4-1.2, "an essential component of the administration of criminal justice." As the Standards recognize, "[a] court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." As set forth in the introduction to the first draft of the Providing Defense Standards, "[t]he fundamental premise of these standards is that representation by counsel is desirable in criminal cases *both* from the viewpoint of the defendant and of society."

"[S]ociety has deliberately chosen the adversary system—a vigorous clash of opposing sides—as the mechanism for trying criminal cases." *Id.* Counsel for the state and the defendant are charged with vigorously pursuing the legal and factual claims relating to alleged violations of the criminal law. An imbalance in this contesting representation has the potential to undermine the judiciary's ability to make an accurate determination of guilt or innocence. Each component, including defense counsel, is

properly regarded as "essential to the fulfillment of the court's responsibility in the administration of criminal justice," for "[t]he adversary system requires defense counsel's presence and zealous professional advocacy just as it requires the presence and zealous advocacy of the prosecutor and the constant neutrality of the judge." ABA Standards for Criminal Justice 4-1.2 cmt (3d ed. 1992).

Consistent with the Standards, this Court has long considered it "an obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). An accused "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). Indeed, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985). This Court has accordingly decreed: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal quotation marks omitted).

The importance of a fully realized right to counsel is thus viewed by commentators as "the most prized, most fundamental constitutional entitlement of every person charged with a criminal offense." James J. Tomkoviez, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2 (2002). "No constitutional right of the accused has been so consistently recognized as 'fundamental' to a fair adjudication of guilt as the Sixth Amendment right to counsel." 2 Joseph G. Cook,

CONSTITUTIONAL RIGHTS OF THE ACCUSED § 8:1 (3d ed. 1996). This "monumental right" has been "highly praised" and is "the master key to all the rules and procedures designed to ensure the reliability of the guilt-determining process." Yale Kamisar, *Foreword* to Tomkoviez, *supra*, at xvii. It is "the linchpin of constitutional protection" (Ronald J. Allen et al., COMPREHENSIVE CRIMINAL PROCEDURE 103 (2001)) and an accused person's "most pervasive right" (Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

3. The ABA Has Recognized that Historical Sources Are Also in Agreement. The value ascribed to the right to counsel by the Standards, this Court's precedents, and commentators relates in no small part to the importance of the right through history. The right to counsel recognized by the states itself traces at least to seventeenth-century England, where common law courts extended it only to those accused of misdemeanors and trespasses – *not* to those accused of the most serious crimes. *E.g.*, 1 James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 397 (1883). As early as 1695, England began to reverse this policy by extending the right to counsel to those accused of serious offenses. The Treason Act of that year authorized "every person * * * accused and indicted, arraigned or tried for any" treason "to make his and their full defence, by counsel learned in the law." 7 Wm. III, c. 3. The moment of indictment has thus always played a significant role in defining the right. Over the course of the eighteenth century — as the state strengthened and stabilized, and as professional prosecutors replaced lay victims — British courts gradually extended the right beyond cases of treason to all criminal trials. Francis H. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIS. REV. 221, 224 (1991). The new rule, recognizing a

universal right to counsel, was finally codified by statute in 1836. 6 & 7 W.4, c. 114, s. 1, 2.

The American colonies recognized the right to counsel through the seventeenth and eighteenth centuries.[5] The

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[5] In 1641, the Massachusetts colony enacted a statute granting the right to unpaid counsel: "Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines." The Body of Liberties: The Liberties of the Massachusetts Collonie in New England, 1641, at 99 (1843), quoted in THE FOUNDERS' CONSTITUTION 246 (Philip B. Kurland & Ralph Lerner, eds., 1987). By 1660, the colony of Rhode Island had gone even further by recognizing "the lawful privilege of any person that is indicted, to procure an attorney to plead any point of law that may make for the clearing of his innocencye." 2 John R. Bartlett, COLONIAL RECORDS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 239 (1857), quoted in Tomkoviez, *supra*, at 11. Rhode Island explained that it granted this universal right because "it doth appeare that any person inhabiting in this jurisdiction, may on good grounds, or through malice and envie be indicted and accused for matters criminall, wherein the person that is soe [accused] may be innocent, and yet may not bee accomplished with soe much wisome and knowledge of the law as to plead his own innocencye." *Id.*

Other colonies followed the lead of Rhode Island. Delaware included in its Charter that "all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." Delaware Charter of 1701, art. V, quoted in THE FOUNDERS CONSTITUTION, *supra*, at 247. Vermont similarly decreed: "[I]n all prosecutions for criminal offenses, a man hath a right to be heard, by himself and his counsel." Vermont Const. of 1777, ch. 1, art. 10, quoted in THE FOUNDERS' CONSTITUTION, *supra*, at 259. Indeed, prior to adoption of the Sixth Amendment, "in at least twelve of the thirteen colonies the rule of the English common law * * * had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions." *Powell* v. *Alabama*, 287 U.S. at 64-65.

absence of the right to counsel in the articles of the original U.S. Constitution was cited as a reason for conditioning ratification upon the addition of a Bill of Rights: "[W]hether the criminal is to be allowed the benefit of counsel, whether he is to be allowed to meet his accuser face to face; * * * we are not yet told. These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges." MASSACHUSETTS RATIFYING CONVENTION, Comments of Mr. Holmes, quoted in THE FOUNDERS' CONSTITUTION, *supra*, at 260. It is therefore unsurprising that when the Bill of Rights was added, it included the guarantee: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. This Court has taken note of the distinctive American focus on the right to counsel: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, *but it is in ours*." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

The ABA has consistently noted this history in formulating its Standards. Thus, as described by the First Edition of the Providing Defense Services Standards (published in 1968), "Our courts have undertaken to protect persons accused of crime and lacking legal representation since the earliest periods of our history." The First Edition noted the recognition of the right to counsel by many states in the nineteenth century, and sought to identify "the most promising avenues for the effectuation of the right to be provided counsel which can be derived from the quite considerable experience of the several states in coping with this problem."

II. The Court of Appeals' Decision Is Not Consistent With The Principle of Defendants Receiving Notice of Their Right To Counsel, And Receiving Counsel, At the Earliest Possible Time, As Expressed In The ABA Criminal Justice Standards and Accompanying Commentary.

A. The Facts and Issues Presented

The first question presented by this case addresses the initial, post-indictment contact between petitioner and the police. Subsequent to petitioner's indictment, police went to his home, where they explained that they wanted to talk to him about his involvement with methamphetamine and his association with certain persons. The district court determined, the court of appeals accepted, and the United States has not challenged in this Court, that petitioner was at that point in police "custody." The police did not advise petitioner of his right to counsel, and no counsel was present during the interview. Petitioner made incriminating statements with respect to the charges.

The Eighth Circuit held that the police had no obligation to advise petitioner of his right to counsel because they did not "interrogate" him. The first question presented accordingly relates to whether the police, upon contacting an indicted criminal defendant to conduct an interview about the charged offenses, should advise the defendant of this right to counsel.

The second question presented addresses the post-indictment interview of petitioner by the police after the police transported petitioner to jail. Prior to this interview, the police advised petitioner of the list of rights available under *Miranda* v. *Arizona*, including a right to counsel. After agreeing to speak with the officers, petitioner reiterated the statements he had previously made at his home and

furthermore admitted his association with additional individuals involved with methamphetamine.

The court of appeals held that petitioner's waiver of his Fifth Amendment *Miranda* rights prior to making incriminating statements *per se* cured any prior violation of petitioner's Sixth Amendment rights, without regard to whether petitioner's statements would otherwise be regarded under the facts and circumstances of the case as the excluded "fruits" of his earlier, unlawfully elicited statements. At a broad level of generality, the second question presented concerns the relationship between *Miranda* warnings and the right to counsel. More specifically – and assuming with respect to the first question presented that officers violated petitioner's Sixth Amendment right to counsel in their initial, post-indictment interview – the second question addresses whether and when such a violation "taints" subsequent statements or alternatively is "cured" by a *Miranda* warning.

B. Question One: The ABA Standards Support the View That, in Their Initial Contact with Petitioner, Police Should Not Have Deliberately Elicited Information from Him Without Advising Him of His Right to Counsel, Given That Petitioner Had Been Indicted.

Both the Standards and this Court's precedents regard the availability of defense counsel as "an essential component of the administration of criminal justice." ABA Standards for Criminal Justice 4-1.2 (3d ed. 1992). The central role of defense counsel in the courts' assessment of guilt and innocence guides the determination of at what point in time the state should advise the defendant of the right to counsel and should provide the defendant with the opportunity to consult with counsel. If a defendant who is arrested or is otherwise the subject of formal charges is delayed or denied access to counsel, the prospect arises that the defendant will act without awareness of his or her rights. ABA Standards for Criminal Justice 5-6.1 accordingly states that counsel should "be provided to the accused as soon as feasible and, in any

event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest." The commentary to the Standard confirms that "[e]ffective representation of the accused requires that counsel be provided at the earliest possible time." The commentary to the comparable standard in the First Edition similarly reflects the "strong consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective."

Indeed, the ABA modified Standard 5-6.1 in 1992 to read "[t]he authorities should *promptly* notify the * * * official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel," adding the word "promptly" in order "to denote the urgency with which action should be taken" in providing counsel. ABA Standards for Criminal Justice 5-6.1 cmt, at 77 (3d ed. 1992) (emphasis added).

Standard 5-8.1 furthermore provides that a person taken into custody "should immediately be informed, preferably by defense counsel, of the right to legal representation." Standard 5-8.1 goes somewhat further than Standard 5-6.1, in that Standard 5-8.1 expressly states that advice about legal representation rights should "preferably" be given "by defense counsel," not law enforcement officials. Standard 5-8.1 "deals with important aspects of achieving early representation by counsel, that is, the party responsible for notifying the accused concerning the right to representation by counsel, where and when such notice should be given, and in what manner it should be provided." ABA Standards for Criminal Justice 5-8.1 cmt (3d ed. 1992). Thus both Standard 5-6.1 and Standard 5-8.1 presume that counsel will be "provided" to defendants who have been formally charged.

These Standards reflect the consensus view of the ABA – and of the experts in the criminal justice field, both prosecution and defense, who had a role in crafting the

Standards – that effective representation of criminal defendants, which is necessary to give meaningful effect to the right to counsel, requires that at a minimum, suspects should be informed of their right to counsel when they are formally charged or taken into custody, before they are questioned. Accord ABA Standards for Criminal Justice, The Defense Function 145 (1st ed. 1971).

Other national criminal justice organizations express similar views in the formal standards they have promulgated. The National Advisory Commission on Criminal Justice Standards and Goals urges that representation be made available "beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect." National Advisory Commission On Criminal Justice Standard 13.1.[6] The Commission notes that the right to counsel is not confined to trial, and that publicly provided lawyers "are involved in the investigatory stages of a criminal case * * *." *Id.*, Intro. to Chapter 13. Further, the National Legal Aid and Defender Association's ("NLADA") Guidelines for Legal Defense Systems in the United States advocate that representation should be available when a person is arrested, detained, or "reasonably believes that a process will commence which might result in a loss of liberty or the imposition of a legal disability of a criminal or punitive nature * * *." 1 National

[6] In 1971, the Law Enforcement Assistance Administration ("LEAA") appointed the National Advisory Commission on Criminal Justice Standards and Goals to formulate national criminal justice standards and goals for crime reduction. In 1973, the commission issued six extensive reports, developed by separate task forces, each with dozens of staff members. The Report of the Task Force on the Courts set standards for each of the criminal justice system's component parts, including courts, court administration, prosecution and defense. 13 Report of National Advisory Commission on Criminal Justice intro. (1973).

Legal Aid and Defender Association Guidelines for Legal Defense Systems 1.1(a), 1.2.[7]

ABA Standard 4-3.6, entitled "Prompt Action to Protect the Accused," sets forth the rationale for making counsel available to the defendant at the outset. "Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights." As the commentary explains, "Many of the rights that the law guarantees to an accused person can be vindicated only by prompt action. One of the lawyer's most significant tasks is to inform the client of the nature, extent, and importance of constitutional and legal rights and to take the procedural steps necessary to protect them. This includes advice concerning the privilege against self-incrimination and the appropriate responses to be made to a lineup, interrogation, or problems relating to statements to news media." ABA Standards for Criminal Justice 4-3.6 cmt (3d ed. 1992). The commentary concludes that "unless the indigent accused is provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means." *Id.*

The police in this case did not adhere to the principles of immediately notifying a defendant of his right to counsel and

[7] Like the ABA Standards, the NLADA Guidelines were adopted after extensive study and consultation, including the preparation of a draft report and a three-day National Colloquium on the Future of Defender Services, to which were invited all state chief justices, state bar presidents, LEAA state planning agency executive directors, and defender program heads from around the country. "The Colloquium produced some 60 commentaries upon the Draft Report, which was then further reviewed by the Commission and Colloquium participants." National Legal Aid and Defender Association Guidelines for Legal Defense Systems intro.

immediately providing the defendant access to counsel. Petitioner had already been formally indicted when he was placed in custody and interviewed by the police. Yet even though he had already been indicted, petitioner was not informed of his right to counsel until after officers deliberately elicited incriminating statements from him and transported him to jail. Under Standard 5-8.1, petitioner should have been advised of his right to, and provided with, counsel immediately upon his first encounter with police, or at least prior to any questioning.

Standard 5-6.1 "extends beyond [this] Court's decisions" (ABA Standards for Criminal Justice 5-6.1 cmt (3d ed. 1992)) with respect to both pre-formal charge questioning and the role of defense counsel once the Sixth Amendment right to counsel attaches. Nevertheless, the core of the Standard as applied to a formally accused suspect is consistent with this Court's precedents and is inconsistent with the approach taken by the court of appeals in this case. It is settled that "an indicted defendant has the 'right to rely on counsel as a "medium" between him and the State' whenever the State attempts to deliberately elicit information from him." *Michigan* v. *Harvey*, 494 U.S. 344, 359 (1990) (citations omitted). There is no dispute either that the initial interview in this case occurred after petitioner was indicted or that the police attempted to "deliberately elicit" information in the course of that interview. Accordingly, under both the Standards and this Court's precedents, petitioner should at least have been advised of his right to counsel before the initial, post-indictment interview.

C. Question Two: The ABA Standards Support Promptly and Fully Advising A Defendant of His Rights Regarding Counsel, and Suggest That Constitutional Violations of Those Rights May Require Greater Remedies Than Do Mere Violations of *Miranda*

With respect to the second question presented, it appears that the police in this case did not conform to the principles

set forth in the ABA Standards and Commentary in their subsequent interview with petitioner at the jail. Rather than providing counsel to the petitioner, and then allowing defense counsel to explain his rights to legal representation, the officers simply advised him of the brief list of rights available under *Miranda* v. *Arizona* in furtherance of the Fifth Amendment right not to be compelled to incriminate oneself. Petitioner then signed a waiver of those rights.

Although police provided the warnings in this case, Standard 5-8.1 provides that a person taken into custody "should immediately be informed, *preferably by defense counsel*, of the right to legal representation" (emphasis added).

The Commentary to Standard 5-8.1 furthermore recognizes a distinction between the Fifth Amendment *Miranda* rights and the distinct Sixth Amendment right to legal representation that attaches when criminal charges are instituted. ABA Standards for Criminal Justice 5-8.1 cmt (3d ed. 1992). The Commentary explains that advising a defendant of the right to counsel "should not be confused with the 'warning' required pursuant to *Miranda* v. *Arizona*." *Id.* "[T]he fact that a warning valid within the meaning of *Miranda* has been made should not in itself be considered as fulfilling the requirements of a formal offer [of counsel]." *Id.* Because "[t]he manner in which counsel is offered to the accused has considerable impact on the decision whether to accept or reject the assistance of counsel," "the circumstances and terms of [a *Miranda*] warning cannot fulfill all the requirements for an offer of counsel." *Id.* In this case, where the police merely "*Mirandized*" petitioner, the Standards have relevance both to the questions of waiver and of remedy.

Although Standard 5-8.1 and its accompanying Commentary – which trace to the promulgation of the First Edition in 1967 – would require more for adequate advice than this Court required in *Patterson* v. *Illinois*, 487 U.S. 295 (1988), *Patterson* does not address the question of what

remedy is required when the police violate *Massiah* v. *United States*, 377 U.S. 201 (1964), and the Sixth Amendment rights of an accused. Indeed, this Court's decisions, like Standard 5-8.1, seem to recognize that a constitutional violation of the Sixth Amendment may require remedies beyond those required when only *Miranda* is violated. Thus, *Michigan* v. *Harvey*, 494 U.S. 344 (1990), suggests that while a violation of the rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), did not require suppression of a statement used for impeachment, a constitutional *Massiah* violation would.

Here, the Eighth Circuit held not merely that *Miranda* warnings provided by police adequately advised petitioner of his right to counsel (a result supported by *Patterson*), but also that the warnings "cured" a previous constitutional violation of the Sixth Amendment such that suppression was not required (an issue not addressed by *Patterson*). The ABA Standards and Commentary are consistent with this Court's decisions in suggesting that once the right to counsel attaches, constitutional violations of that right require greater remedies than mere violations of *Miranda*.[8]

CONCLUSION

This *amicus brief* is intended to emphasize the ABA's long-standing concern for meaningful protection of the constitutional right to counsel for all persons formally charged with a crime, and to note that greater protections may be required for Sixth Amendment violations than for simple

[8] The presence of the prior constitutional violation in this case also distinguishes it from *Oregon* v. *Elstad*, 470 U.S. 298 (1985), in which this Court was careful to distinguish what it viewed as a non-constitutional *Miranda* violation from a "constitutional violation," which "traditionally ha[s] mandated a broad application of the 'fruits' doctrine." *Id.* at 305-06. See also *id.* at 308 (distinguishing the case from "the doctrine expressed in *Wong Sun* that the fruits of a constitutional violation must be

Miranda violations, in order to make vital the constitutional Right to Counsel.

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IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1) Should the fruit of the poisonous tree doctrine extend to exclude evidence of a confession taken in compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) but which occurred after an earlier violation of *Massiah* v. *United States*, 377 U. S. 201 (1964)?

2) Should *Massiah* continue to regulate direct confrontations between the police and the accused?

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IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

This case threatens to extend the costly rule of *Massiah* v. *United States*, 377 U. S. 201 (1964) to strike down an otherwise valid confession as derivative evidence under the fruit of the poisonous tree doctrine. The threat to society of lost convictions and frustrated investigations from extending *Massiah* is

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

contrary to the interests of justice and public safety that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

After the defendant, John J. Fellers, was indicted for conspiracy to distribute methamphetamine, two police officers went to Fellers' house to arrest him on the charge. See *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002). The officers told Fellers that they were there pursuant to an indictment and that they wanted to discuss his involvement in the conspiracy. See *ibid.* Fellers indicated that he had associated with the people named by the officers and that he had used methamphetamine. See *ibid.* The officers did not give Fellers any *Miranda* v. *Arizona*, 384 U. S. 436 (1966) warnings at this time. See *Fellers*, *supra*, at 723. Fellers was then taken to jail, where he was given *Miranda* warnings, signed a waiver and talked to the officers, reiterating his inculpatory statements and admitting to his association with several more co-conspirators. See *ibid.*

Fellers was tried in Federal District Court. The magistrate judge found that Fellers was in custody at the time of the first statement and that both statements should be suppressed. *Ibid.*[2] The district judge suppressed the statements made at Fellers' home, but admitted those made at the jail. See *ibid.* A jury convicted him of conspiracy to distribute between 50 and 500 grams of methamphetamine. See *ibid.*

The Court of Appeals, citing *Oregon* v. *Elstad*, 470 U. S. 298 (1985), affirmed the conviction and sentence. See *Fellers*, 285 F. 3d, at 274. This Court granted certiorari on March 10, 2003.

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2. This case illustrates, once again, how the vague definition of custody has failed to give police clear guidance. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *United States* v. *Patane*, No. 02-1183, at 14.

SUMMARY OF ARGUMENT

The Sixth Amendment entitles the defendant to counsel in certain critical stages of the prosecution where an attorney's advocacy or legal expertise is necessary to preserve a fair trial and a reliable verdict. The encounters regulated by *Massiah* v. *United States* do not call for the legal expertise or advocacy of counsel. This is particularly true in the case of encounters between the police and the accused, which are now governed by *Miranda* v. *Arizona*. At best, *Massiah* creates a right to fairness by preventing the defendant from compromising his or her defense after the prosecution begins. This departure from Sixth Amendment principles comes at a high cost in lost voluntary admissions of guilt and delayed prosecutions. *Massiah* pushes the boundaries of the Sixth Amendment so far that it should not be extended any further.

The "fruit of the poisonous tree" doctrine is applied only when it preserves the core values of the underlying right that was violated. As an extension of the already costly exclusionary rule, the fruits doctrine should only be imposed when it is absolutely necessary.

There are instances where suppressing derivative evidence is not controversial. Where the government gains knowledge about other tangible evidence through an illegal act and then exploits that knowledge to gain possession over the newly discovered evidence, the fruits doctrine must apply. Since the causal connection between the illegal act and the derivative evidence is inseparable in these cases, failing to suppress the derivative evidence would fatally undermine the underlying right.

Applying the fruits doctrine to confessions is not as simple. Since a valid confession is a voluntary act, the causal connection between the constitutional violation and the allegedly derivative confession is more difficult to find. These cases involve a more detailed analysis which turns on constitutional policy. Fifth Amendment interests drove the decision not to

extend the fruits doctrine to an otherwise valid confession that followed an earlier *Miranda* violation. The analysis of confessions following Fourth Amendment violations follows the same pattern. This type of analysis governs the application of the fruits doctrine in this case.

No legitimate Sixth Amendment interest is served by suppressing a confession that satisfies *Miranda* simply because it follows a *Massiah* violation. *Massiah* itself serves no core Sixth Amendment principles, and since suppressing voluntary confessions is costly to society, the balance of interests tips heavily against suppression.

Massiah should no longer apply to direct confrontations between the police and the accused. *Massiah*'s cost to society, inconsistency with Sixth Amendment principles, and minimal reliance interest all support a partial reconsideration of *Massiah*. *Miranda* renders *Massiah* redundant in direct encounters between the police and the accused. Removing *Massiah* from these cases would minimally alter existing precedent and prevent defendants from accruing windfalls.

ARGUMENT

Amicus will address whether an initial violation of *Massiah* v. *United States*, 377 U. S. 201 (1964) prevents the admission of a subsequent confession that was taken after a valid *Miranda* v. *Arizona*, 384 U. S. 436 (1966) waiver. This "fruit of the poisonous tree," see *Nardone* v. *United States*, 308 U. S. 338, 341 (1939), analysis is premised on the assumption that the arresting officers violated *Massiah* when they told Fellers that they wanted to talk about his involvement with the drug conspiracy. It is worth noting, however, that it is far from clear that Fellers' *Massiah* rights were in fact violated. Under *Massiah*, the admissibility of a post-indictment statement turns on whether it was deliberately elicited from the accused by the police, see 377 U. S., at 206, absent a valid waiver of the right to counsel. The conclusion that the officers' first encounter

with Fellers comes under this vague standard is an open question, but *amicus* chooses to concentrate on broader issues concerning *Massiah* and the fruits doctrine. *Amicus* argues that an initial *Massiah* violation should not cause the suppression of a subsequent voluntary confession under the fruit of the poisonous tree doctrine.

The conclusion that *Massiah* does not bar a subsequent valid confession stands on another premise, that an indicted defendant can be interrogated by the police without the presence of defense counsel if the defendant gives a valid *Miranda* waiver. Since *Miranda* warnings inform the defendant of his right to counsel, see *Miranda*, 384 U. S., at 479, a valid *Miranda* waiver will also validly waive any *Massiah* right to counsel. *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988). As the second confession satisfies *Massiah* as well as *Miranda*, the only question is whether an initial *Massiah* violation requires suppressing this otherwise valid admission of guilt. The answer is "no."

I. *Massiah* extends the Sixth Amendment to its "outermost point," and it should not be extended any further.

Massiah v. *United States*, 377 U. S. 201 (1964) was a revolutionary decision. *Massiah*'s revolution was how it extended the right to counsel to regulate the government's power to investigate defendants after the initiation of proceedings. These encounters differ greatly from the other critical stages recognized by the Court, because they do not raise the same need for counsel's presence found in the other Sixth Amendment cases. As Justice Blackmun observed, "*Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point." *United States* v. *Henry*, 447 U. S. 264, 282 (1980) (Blackmun, J., dissenting). Since application of the fruit of the poisonous tree doctrine is a function of the principles of the violated constitutional right,

see Part II, *infra*, understanding *Massiah*'s revolution is essential.

A. Sixth Amendment Principles.

An understanding of *Massiah*'s divergence from the Sixth Amendment begins by examining the principles of the right to counsel. History provides only limited guidance for interpreting the right. The Sixth Amendment broke from the English common law practice, which placed substantial limits upon the accused's ability to employ counsel. See *Powell* v. *Alabama*, 287 U. S. 45, 60 (1932); Office of Legal Policy, Report to the Attorney General on The Sixth Amendment Right to Counsel Under the *Massiah* Line of Cases, 22 U. Mich. J. L. Ref. 661, 672-673 (1989) ("*Massiah* Right to Counsel"). Unfortunately, the Founders provided no guidance as to why the right to counsel was included in the Sixth Amendment, or what it meant. See W. Beaney, The Right to Counsel in American Courts 23-24 (1955).

While the history of the right to counsel is dim, the rationale behind it is better understood. The classical justification for providing attorneys for criminal defendants is found in *Powell*.

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." 287 U. S., at 69.

An attorney's aid is not constitutionally required simply to give assistance to the defendant. It is to provide the accused with someone "skill[ed] in the science of law." See *ibid.* As Justice Black noted, the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462-463 (1938).

The right to counsel is governed by these considerations. The "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). "This review of the history and expansion of the Sixth Amendment Counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.*, at 313.

The decisions other than *Massiah* expanding the right to counsel to pretrial stages are consistent with these principles. Counsel's presence at the preliminary hearing can prevent an erroneous prosecution, develop impeaching evidence against the government's witnesses at trial, discover the State's case, or make effective arguments for an early mental examination or bail. See *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970) (plurality). An unrepresented defendant cannot do this, see *ibid.*, to his or her considerable detriment. In *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), an insanity plea, pleas in abatement, and grand jury discrimination challenges had to be made at the arraignment. See *id.*, at 53-54. The ability to understand the defense and make the plea is the unique province of counsel. An unrepresented defendant could lose these defenses forever, see

id., at 54, justifying an extension of the right to counsel to this phase of the prosecution.

The extension of the right to counsel outside the courtroom is no different. In *United States* v. *Wade*, 388 U. S. 218 (1967), this Court recognized a right to counsel at post-indictment identification lineup. The opinion began with a framework for determining when to apply the right to counsel to a pretrial encounter. The principles of *Powell* "calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*, at 227.

Not every pretrial effort to identify the defendant required the presence of counsel. Analysis "of the accused's fingerprints, blood sample, clothing, hair, and the like," see *ibid.*, without defense counsel did not threaten the trial's fairness because the veracity of any identification could be tested by cross-examining the government's expert witnesses at trial and presentation of defendant's own experts. See *id.*, at 227-228. The lineup, however, posed a risk of misidentification of the perpetrator that could not be readily corrected through confrontation at trial. "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228. Eyewitness identification raises genuine issues about the reliability of a conviction. There are justifiable concerns about the accuracy and reliability of eyewitness testimony, see *id.*, at 228-229; *Manson* v. *Brathwaite*, 432 U. S. 98, 111-112 (1977), but nonetheless eyewitnesses have enormous influence over juries. See E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal § 1-2, p. 2 (3d ed. 1997). Therefore eyewitness misidentification is perhaps the largest source of wrongful convictions. See *Wade*, 388 U. S., at 229.

Wade's right to counsel protects defendants from misidentification at the lineup. The presence of counsel guards against

rigged lineups, like a lineup of six white men and one black man, see Loftus & Doyle, § 6-17(b), at 143, as well as more subtle forms of suggestion. See *id.*, § 6-12, at 130. Assessing the reliability of a lineup identification requires detailed analysis of a host of complex factors. See *id.*, § 6-17, at 140-141. The accused in a lineup needs someone with counsel's knowledge of the problems and practices of lineups to guard against a wrongful identification. See *Wade*, 388 U. S., at 230-231. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231-232. Quite simply, *Wade* provides criminal defendants with an essential guard against wrongful conviction.

The cases declining to extend the right of counsel to particular events are consistent with these principles. Where the accused is not faced with complex legal proceedings or some other substantial risk of an unfair trial, then there is no critical stage that warrants a right to counsel. Taking handwriting exemplars is not a critical stage because "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." *Gilbert* v. *California*, 388 U. S. 263, 267 (1967). Similarly, no counsel was required for a post-indictment *photo* lineup because "no possibility arises that the accused might be mislead with his lack of familiarity with the law or overpowered by his professional adversary," and counsel would not "be used to produce equality in a trial-like adversarial confrontation." *Ash*, 413 U. S., at 317.

With one notable exception, the right to counsel cases are consistent. Absent the initiation of proceedings against the accused and the presence of complex legal proceedings or a special threat to the fairness of the trial, an event is not covered by the right to counsel. The one exception to this rule is *Massiah*.

B. Massiah's Revolution.

Understanding *Massiah*'s revolution begins by analyzing its facts and reasoning. Massiah, Colson, and some others were indicted on a variety of federal narcotics charges. See 377 U. S., at 202. Colson agreed to work with the government and allowed a federal agent to place a radio transmitter in his car. See *id.*, at 202-203. The federal agent used this transmitter to surreptitiously overhear incriminating statements made by Massiah during a conversation with Colson, which were then recited at Massiah's trial. See *id.*, at 203.

Massiah claimed that the use of the transmitter violated the Fourth Amendment, while the government's deliberate elicitation of statements from him in the absence of counsel violated the Fifth and Sixth Amendments. See *id.*, at 203-204. Instead of dealing with a tricky Fourth Amendment issue regarding the eavesdropping, see 2 W. LaFave, J. Israel, & N. King, Criminal Procedure 6.4(b), p. 479 (2d ed. 1999), this Court bypassed the Fourth Amendment claim, see *Massiah*, *supra*, at 204, and began its analysis with an examination of *Spano* v. *New York*, 360 U. S. 315 (1959). See *Massiah*, *supra*, at 204. *Spano* was a confession case in which the Court's opinion struck down the conviction because the confession failed the due process voluntariness test. See 360 U. S., at 323-324. Four concurring Justices stated that the confession should be suppressed because the defendant had a right to counsel during this post-indictment questioning. See *id.*, at 326 (Douglas, J., concurring); *id.*, at 327 (Stewart, J., concurring). The *Massiah* Court noted the *Spano* concurrences, and the fact that since *Spano*, New York courts recognized a right to counsel in any interrogation after indictment. See 377 U. S., at 204-205. The rest of the opinion extends the rule of the *Spano* concurrences beyond custodial interrogations to the facts of *Massiah*, see *id.*, at 206, and explains that this new rule does not needlessly prevent the continuing investigation of a defendant after an indictment. See *id.*, at 206-207.

Massiah is notable for lacking any substantial justification for its holding. "The doctrinal underpinnings of *Massiah* have been largely left unexplained . . . ." *Henry* v. *United States*, 447 U. S. 264, 290 (1980) (Rehnquist, J., dissenting). This Court's interpretations of *Massiah* add little to its scant justification. The "Christian burial speech" case, *Brewer* v. *Williams*, 430 U. S. 387, 392-393 (1977), found *Massiah* applicable to a case where it characterized the police conduct as equal to or more effective than interrogation. *Id.*, at 399. Its explanation of the reasons for *Massiah* consisted of a quotation from Justice Sutherland's famous passage from *Powell*, see *id.*, at 398, and the conclusion that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Ibid.* The rest of the analysis focused on finding that the speech violated *Massiah*, see *id.*, at 399-401, and that the *Massiah* right to counsel could not be waived implicitly. See *id.*, at 401-406.

Other decisions provide no additional justification for *Massiah*. The case dealing with Williams' conviction on retrial, *Nix* v. *Williams*, 467 U. S. 431 (1984), addressed whether the victim's body that was discovered through the Christian burial speech should be suppressed under the fruit of the poisonous tree doctrine. See *id.*, at 441. The *Nix* Court's use of the fruit of the poisonous tree doctrine is discussed later in this brief, see *infra*, at 16-17, but like *Brewer*, it contains no meaningful explanation of *Massiah*'s basis. *Henry* addressed what is meant by *Massiah*'s use of the term "deliberately elicited." See 447 U. S., at 270. It was able to decide the issue without explaining *Massiah*'s rationale any further. See *id.*, at 290 (Rehnquist, J., dissenting).

Only *Maine* v. *Moulton*, 474 U. S. 159 (1985) has provided any semblance of analytical support for *Massiah*. The opinion noted the importance of the right to counsel and quoted from the passage in *Powell*. See *id.*, at 169. It explained that the right to counsel is not limited to the trial, but rather "is shaped

by the need for assistance of counsel." *Id.*, at 170. After this was a brief recitation of the critical stages doctrine, see *ibid.*, a recitation of the passage from *Brewer* quoted above, see *ibid.*, and a concluding passage about the importance to the defendant of the initiation of proceedings. See *ibid.* Absent from *Moulton* or any other Supreme Court opinion is a detailed analysis of how *Massiah* advances Sixth Amendment principles.

Massiah lacks better justification because it is so difficult to justify. Defendants are entitled to counsel when there is a special need for counsel's legal expertise or advocacy. Just as the Scottsboro boys could not be expected to defend themselves without the help of an attorney until the morning of the trial, *Powell*, 287 U. S., at 56, a layperson cannot effectively represent himself or herself at a preliminary hearing or arraignment. See *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970) (plurality); *Hamilton* v. *Alabama*, 368 U. S., at 54-55; *supra*, at 6-8.

Massiah does not present a similar need for legal expertise. "In this situation, the accused is not confronted with complex legal procedures or by an expert adversary . . . ." *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 685-686. Most *Massiah* cases have not involved any direct confrontation between the government and the accused. Instead, in the typical case, the government used an informer as an agent to gather information by talking to the defendant about the case. See *Massiah*, 377 U. S., at 201; *Henry*, 447 U. S., at 266; *Moulton*, 474 U. S., at 161. While counsel can preserve a defense at an arraignment or prevent an unfair lineup at the stationhouse, these undercover operations do not create a need for the special expertise or advocacy of the attorney. The risk of speaking to a person who may "snitch" is well within the knowledge and experience of laymen.

Direct encounters between the police and the indicted defendant, see *Brewer*, 430 U. S., at 392; *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002), provide no more justification for a separate Sixth Amendment right to counsel's

presence. Most police attempts to elicit information directly from indicted suspects will be custodial interrogations governed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Since a valid *Miranda* waiver also waives the *Massiah* right to counsel, see *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988), *Massiah* is redundant in most confrontations between the police and an indicted defendant. See *infra*, at 29-30. *Massiah* will govern only in those rare confrontations where the accused is questioned but not in custody, or when the police attempt to deliberately elicit information from the defendant through methods that fall short of actual interrogation. See *Henry*, 447 U. S., at 271 (acts short of interrogation come within the deliberately elicit standard). Even if such a confrontation is possible, where *Miranda* is unnecessary there must be little need for the *Massiah* right to counsel.

A sense of fairness is the best explanation for *Massiah*. See *Massiah*, 377 U. S., at 205 (quoting *People* v. *Waterman*, 175 N. E. 2d 445, 448 (N.Y. 1961)). Since there is no real need for the legal expertise or the advocacy skills of counsel in the confrontations that *Massiah* governs, *Massiah*'s right is more like a "cover for a judicially imposed policy against the use of post-indictment confessions." See *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 688. The initiation of proceedings entitles the defendant to the assistance of counsel. See *Brewer*, 430 U. S., at 398. The availability of counsel before the trial gives the defendant's attorney the opportunity to prepare the case and mount an effective defense. See *ibid.* Knowingly eliciting incriminating information from the accused during this preparatory phase can all but end the defense before it begins. Once a confession is obtained by the police or undercover informants, counsel's role may be reduced to finding the best plea bargain under the difficult circumstances produced by the accused's admissions.

Massiah guards against an alleged unfairness that is neither particularly unfair, nor within traditional province of counsel. A *Massiah* violation does not deprive the defendant of counsel

in any normal sense. "Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed." *Massiah*, 377 U. S., at 209 (White, J., dissenting). At best, this right operates at the far reaches of the right to counsel.

Massiah exacts a high price for its extreme application of the right to counsel. It excludes highly relevant, voluntary, self-incriminating statements from the accused. Confessions and admissions to third parties are not mere necessary evils. "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Such admissions "are more than merely 'desirable,' [citation] they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986). *Massiah* also creates an incentive to delay initiating proceedings against a suspect until the investigation is complete. This leaves potentially dangerous suspects to prowl the streets longer than due process requires. See *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 689. Even if this Court decides not to modify *Massiah*, see Part IV, *infra*, the Sixth Amendment should not be stretched any further.

II. The costly fruit of the poisonous tree doctrine is applied only when it preserves the core values of the underlying constitutional right.

If this Court finds that the initial encounter between Fellers and the arresting officers produced a *Massiah* violation, then this case centers on whether the fruit of the poisonous tree doctrine extends to cover the jailhouse confession that was taken in conformity with *Massiah* and *Miranda* v. *Arizona*, 384 U. S. 436 (1968). See *supra*, at 4-5. Courts administering this derivative evidence doctrine must be careful not to substitute metaphor for analysis. "Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Ave. R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926) (Cardozo, J.). The fruit of the poisonous tree is a metaphor, see *Oregon* v. *Elstad*, 470 U. S. 298, 303 (1985), that is misleading when taken out of context. It is a more limited doctrine than its broad metaphor seemingly suggests.

A. The Costly Doctrine.

The fruit of the poisonous tree doctrine is an extension of the exclusionary rule. Under the exclusionary rule, evidence taken through means that violate the Fourth Amendment is excluded in order to deter future constitutional violations. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). The exclusion of relevant, reliable evidence comes at a high cost to society. See *Stone* v. *Powell*, 428 U. S. 465, 490-491 (1976). The fruits doctrine goes one step further, extending the exclusionary rule to evidence taken in a constitutional manner but somehow "tainted" by a prior constitutional violation, making an already costly doctrine even more expensive.

This Court appreciates the high cost of this doctrine. "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix* v. *Williams*, 467 U. S. 431, 442-443 (1984). Therefore, the fruits doctrine is applied practically rather than mechanically. Any application of the fruits doctrine must consider the context of the initial constitutional violation and the derivative evidence under attack.

B. Uncontroversial Applications.

There are times when the fruits doctrine can be applied without controversy. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920) provides the template for excluding

derivative evidence. After an indictment against the company, agents of the United States illegally entered its office "and made a clean sweep of all the books, papers, and documents found there." *Id.*, at 390. The Court ordered the originals returned, but the government made copies and used them to subpoena Silverthorne Lumber to produce the originals. See *id.*, at 390-391. Forcing the company to produce the records through this trick "reduces the Fourth Amendment to a form of words." *Id.*, at 392. The government cannot be allowed to exploit the illegal seizure to legally acquire the goods it illegally seized. The Fourth Amendment protects privacy. See *Payton* v. *New York*, 445 U. S. 573, 589 (1980). Upholding the subpoena in *Silverthorne* would have made a mockery of the company's privacy.

Silverthorne demonstrates that it is comparatively simple to apply the fruits doctrine to tangible evidence obtained in this manner. In these cases, the government typically gains knowledge of the evidence through an illegal act, and then uses that knowledge to gain possession over the newly discovered piece of evidence. Where the causal connection between the illegal act and the derivative evidence is inseparable, failing to suppress the derivative evidence fatally undermines the underlying right.

Nix v. *Williams*, 467 U. S. 431 (1984) is a more modern example of this relationship between a constitutional violation and derivative evidence. This decision addressed the second trial of the defendant in *Brewer* v. *Williams*, 430 U. S. 387 (1977). While the *Brewer* Court held that *Massiah* suppressed the statements of Williams that were induced by the "Christian burial speech," it reserved the issue of whether the fruits of that speech should be suppressed. See *id.*, at 406-407, n. 12. *Nix* applied the fruits doctrine to this *Massiah* violation, see 467 U. S., at 441-442, but admitted the derivative evidence under the inevitable discovery exception. See *id.*, at 448. Like *Silverthorne*, there was an unmistakable connection between

the constitutional violation and the tangible fruits of that violation.

The speech struck down in *Brewer* was an appeal to Williams to identify the location of his victim's body so that the young girl might be given a proper Christian burial. See 430 U. S., at 392. *Nix* addressed the admissibility of "evidence pertaining to the discovery and condition of the victim's body . . . ." 467 U. S., at 434. Williams' responses to the illegal speech allowed the government to find the victim's body. Since the *Massiah* violation gave the government the knowledge that allowed them to find this derivative evidence, the *Nix* Court had no choice but to apply the fruits doctrine.[3]

Nix cited *United States* v. *Wade*, 388 U. S. 218 (1967) for the proposition that the fruits doctrine applied to Sixth Amendment violations. See 467 U. S., at 442. *Wade* involved uniquely compelling reasons to suppress derivative evidence. *Wade* held that a post-indictment lineup without counsel violated the Sixth Amendment, 388 U. S., at 237, and that any in-court identification of the accused by witnesses who participated in the unconstitutional lineup was subject to suppression under the fruits doctrine. See *id.*, at 241 (applying *Wong Sun* v. *United States*, 371 U. S. 471 (1963)). Here, the constitutional violation did not allow the government to discover the derivative evidence. Instead, the initial Sixth Amendment violation rendered the derivative evidence unreliable.

The primary threat posed by lineups is misidentification through suggestion. "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for

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3. While the result in *Nix* differed from that in *Silverthorne*, that is a result of the availability of the inevitable discovery rule rather than the relationship between the derivative evidence and the constitutional violation. Compare *Nix*, 467 U. S., at 449-450, with *Silverthorne*, 251 U. S., at 392.

pretrial identification." *Wade*, 388 U. S., at 228. Once the witness identifies the victim in a lineup there is usually no going back for the witness.

> "Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " *Id.*, at 229 (footnote omitted).

Wade's right to counsel guards against improperly suggestive lineups. See *id.*, at 236-237. A lineup lacking this protection can illegally transmit the information that the accused is the perpetrator from the government to the witness. Once the witness accepts this suggestion he or she is almost certain to repeat it at trial, giving the government valuable evidence that is almost impossible to attack through cross-examination. See *id.*, at 232. Any in-court identification after an uncounseled lineup poses an excessive risk of being unreliable. The *Wade* Court had little option but to apply the fruits doctrine and require the government to purge the taint. See *id.*, at 241.

The present case is distinguished from these by the fact that the allegedly tainted evidence is a confession. Confessions are not discovered like photographs, drugs, or a body. A valid confession must be the voluntary act of the defendant. See *Dickerson* v. *United States*, 530 U. S. 428, 433 (2000). The exploitation of improperly gained knowledge does not enter this equation. A defendant who voluntarily confesses knows that he or she is guilty, and the interrogating officer thinks the same. This does not render the fruits doctrine irrelevant to confessions obtained after constitutional violations. Indeed, the most famous fruits case involved the suppression of a derivative confession. See *Wong Sun* v. *United States*, 371 U. S. 471, 485-486 (1963). Confessions, however, require more detailed analysis than found in the previously mentioned applications of

the fruits doctrine. This analysis reveals the true nature of the fruits doctrine.

C. Confessions and Complex Analysis.

The Court's treatment of confessions under the fruits doctrine shows how this doctrine is driven by constitutional policy. *Oregon* v. *Elstad*, 470 U. S. 298 (1985) demonstrates this relationship between the Constitution and the fruits doctrine. *Elstad* involved an initial interrogation that produced a confession taken contrary to the *Miranda* rule, followed by a confession by the same suspect that complied with *Miranda*. See *id.*, at 300. Instead of unthinkingly applying the fruits doctrine to suppress the second confession, the *Elstad* Court examined the constitutional ends served by the Fifth Amendment and *Miranda*.

The opinion first examined *Miranda*'s relationship to the Fifth Amendment. "*Miranda* required suppression of many statements that would have been admissible under traditional due process analysis" through its conclusive presumption. See *id.*, at 304. This overprotection of the Fifth Amendment, see *id.*, at 306, came at a considerable cost. Voluntary confessions play a valuable role in our criminal justice system. See *id.*, at 305. "*Miranda*'s preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Id.*, at 307. This means that a failure to give *Miranda* warnings is not itself a constitutional violation, see *id.*, at 306, and n. 1, and thus statements taken contrary to *Miranda* can be used for other purposes. See *id.*, at 307. Since *Miranda* already operates at the limits of the Fifth Amendment, applying the fruits doctrine to subsequent confessions would push this rule too far.

> "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary

and informed waiver is ineffective for some indeterminate period." *Id.*, at 309.

The *Elstad* Court compared *Miranda* to the Fourth Amendment exclusionary rule and found "fundamental differences" between the two. *Id.*, at 304. The Fourth Amendment's exclusionary rule only deters constitutional violations, see *id.*, at 306, as opposed to *Miranda*'s overdeterrence. This justified a broader application of the fruits doctrine to Fourth Amendment violations than to *Miranda* claims. See *ibid.* Since excluding an allegedly derivative, but otherwise legal confession would not advance the legitimate interests of *Miranda* or the Fifth Amendment, suppression was not justified.

Even the "traditionally mandated broad application" of the fruits doctrine to Fourth Amendment violations, see *ibid.*, requires justification derived from constitutional policy. This reasoning is found in the first broad application of the doctrine, *Wong Sun* v. *United States*, *supra*. *Wong Sun* addressed the admissibility of statements made by the arrestee in the course of his illegal arrest. See 371 U. S., at 484. It held that since the statements were derived from an illegal seizure they must be excluded under the logic of the exclusionary rule.

> "Either in terms of deterring lawless conduct by federal officers, [citation] or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, [citation] the danger of relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." *Id.*, at 486.

The decisions after *Wong Sun* reinforce and explain the relationship between the fruits doctrine and the constitutional right it protects. *Brown* v. *Illinois*, 422 U. S. 590 (1975) addressed the impact of *Miranda* on *Wong Sun*. Since *Wong Sun* was decided before *Miranda*, a valid *Miranda* waiver might distinguish the case from *Wong Sun* and the fruits doctrine. See *id.*, at 591-592. This claim was rejected because of the role played by illegal seizures in securing confessions.

" '[T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.' " *Id.*, at 602 (quoting *Boyd* v. *United States*, 116 U. S. 616, 633 (1886)).

Custody does play an important role in securing confessions. The isolation and control brought about by custody placed considerable pressure to confess on the suspect. "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U. S., at 455. The "inherently compelling pressures" on custodial suspects justified requiring the *Miranda* warnings before custodial interrogations. See *id.*, at 467. Therefore illegal arrests give police an unwarranted edge in getting the suspect to confess.

If the fruits doctrine did not apply to confessions following illegal arrests, then the temptation to arrest without probable cause would be too great.

> "Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.' " *Brown*, 422 U. S., at 602-603 (footnote omitted).

The close connection between illegal arrests and confessions meant that the prosecution must independently establish that the confession was "the product of a free will under *Wong Sun*" under "the facts of each case." *Id.*, at 603. While *Miranda* played an important role in attenuating the taint of the illegal

arrest, it was far from dispositive on this issue. See *id.*, at 603-604.

Like *Elstad*, the *Brown* decision reflected the different interests served by the Fourth and Fifth Amendment exclusionary rules. See *id.*, at 601. "*Brown* articulated a test designed to vindicate the 'distinct policies and interests of the Fourth Amendment.' " *Dunaway* v. *New York*, 442 U. S. 200, 217 (1979) (quoting *Brown*, 422 U. S., at 602). It focused on the relationship between the illegal arrest and the confession in order to advance the policies behind the Fourth Amendment exclusionary rule. See *Dunaway*, *supra*, at 217-218. Concentrating on the causal connection between the arrest and the confessions reinforces the exclusionary rule's deterrent and promotes the integrity of the courts. See *id.*, at 218. Where suspects are arrested without probable cause in the hope that they will confess while in custody, police should not profit from that illegality without some meaningful intervening event. See *Taylor* v. *Alabama*, 457 U. S. 687, 693 (1982).

Confessions are treated differently than other evidence because the causal connection between a voluntary confession and a prior constitutional violation is more difficult to establish. *Brown*, *Wong Sun*, and *Dunaway* show that application of the fruit of the poisonous tree doctrine is driven by constitutional policy rather than by simple logical causation. While the custody gained through an arrest may be an important factor in securing a confession, custody does not "cause" a confession in any logical sense. At least since *Miranda*, many custodial interrogations do not generate confessions. See Cassel, Protecting the Innocent from False Confessions and Lost Confessions—And from *Miranda*, 88 J. Crim. L. & Criminology 497, 542 (1998). Under the fruits doctrine, causation in this sense is a function of constitutional policy. Derivative evidence is only excluded when necessary to protect the principles of the constitutional right that was violated.

The inevitable discovery exception reflects this limited fruits doctrine. In *Nix* v. *Williams*, 467 U. S. 431 (1984), the

purpose of the Sixth Amendment right to counsel drove the application of this exception. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Id.*, at 446. The Sixth Amendment guards against unfairness by testing the reliability of evidence through the adversary process. See *ibid.* Since there was no reason to doubt the reliability of the evidence here, see *ibid.*, "[s]uppression, in these circumstances would do nothing to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Ibid.* The Sixth Amendment insures fairness by protecting the defendant from "one-sided" confrontations with the prosecution. See *id.*, at 447 (internal quotation marks omitted). If application of the fruits doctrine places the state in the same position it would be in if the constitutional violation never happened, then fairness is assured. See *ibid.* Admitting evidence that would have been discovered anyway only keeps the state from being put in a worse position, which is only fair. See *ibid.*

Decisions to apply the exclusionary rule in particular circumstances are made through a cost-benefit analysis. This applies both to the types of proceedings to which the exclusionary rule extends, see *Immigration & Naturalization Service* v. *Lopez-Mendoza*, 468 U. S. 1032, 1042 (1984) (deportation proceedings), or when deciding not to apply the exclusionary rule to a particular set of facts. See *United States* v. *Leon*, 468 U. S. 897, 913 (1984) (good faith exception for warrant searches); *Elstad*, 470 U. S., at 312. As in *Elstad*, any decision on whether to apply the fruits doctrine to this case must be informed by balancing the relevant constitutional interests. The balance tilts sharply against excluding voluntary confessions made after *Massiah* violations.

III. The fruit of the poisonous tree doctrine should not be applied to an otherwise valid confession made after a *Massiah* violation.

The exclusionary rule of *Massiah* v. *United States*, 377 U. S. 201 (1964) should not extend to strike down a confession made in compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), but after a *Massiah* violation. Extending *Massiah* in this way does not advance any legitimate Sixth Amendment interests, and exacts a heavy price from society.

The cost of striking down Fellers' confession is considerable, since admitting voluntary confessions into evidence serves a vital public interest. See *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986). Unless admitting the confession does substantial harm to the interests protected by the Sixth Amendment, the fruits doctrine should not apply. *Massiah*'s tenuous relationship with Sixth Amendment principles, see Part I, *supra*, is a strong reason for not extending it to this case.

Oregon v. *Elstad*, 470 U. S. 298 (1985) completes the case against extending the fruits doctrine to confessions. *Elstad* rested on two grounds. First, *Miranda*'s Fifth Amendment guarantee served different interests than the Fourth Amendment exclusionary rule which forms the traditional basis for the fruits doctrine. See *id.*, at 304. Applying the fruits doctrine would not serve the Fifth Amendment's goal, and therefore there was no need to suppress the second confession. See *id.*, at 308; *supra*, at 19-20.

The *Elstad* Court also held that taking a confession contrary to *Miranda* did not undermine the voluntariness of the subsequent *Miranda* waiver or the second confession. While an earlier coerced confession can render a later confession involuntary, failing to give *Miranda* warnings only creates a presumption that the first confession was coerced. See *Elstad*, 470 U. S., at 310. Where the first confession was unwarned but voluntary, administering the *Miranda* warnings before a

subsequent interrogation "serves to cure the condition that rendered the unwarned statement inadmissible." *Id.*, at 311.

The fact that the first confession "let the cat out of the bag" did not compromise the voluntariness of the subsequent *Miranda* waiver. See *ibid.* "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Id.*, at 312. The *Miranda* warnings that preceded the second confession "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.*, at 314.

Fellers was given his *Miranda* warnings and gave an express waiver before his jailhouse confession. See *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002). This also waives his *Massiah* rights. *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988). *Elstad* demonstrates that Fellers' first voluntary, but *Massiah*-barred incriminating statements do not compromise the validity of his *Miranda* waiver or subsequent confession. Since nothing in his first statement was coerced, the bare fact that it let the "cat out of the bag" did not invalidate Fellers' *Miranda* waiver. The *Miranda* warnings informed Fellers of his rights to silence and counsel, correcting any problems arising from his first incriminating statement.

Elstad is crucial to resolving Fellers' claims. This decision prevents any attempt to suppress Fellers' second statement simply because this first statement was taken contrary to *Miranda*. See *Fellers*, 285 F. 3d, at 724. Since *Massiah* is a Sixth Amendment right, *Elstad* is not identical to Fellers' *Massiah* claim. The decision to admit the second confession had to be consistent with Fifth Amendment principles, see 470 U. S., at 304, while the present case revolves around Sixth Amendment principles which do differ from the Fifth Amendment. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980). Differences in constitutional principles did play an important role in determining the reach of the fruits doctrine in *Elstad*, see 470 U. S., at 306 (distinguishing between Fourth

and Fifth Amendment principles), but the differences between the Fifth and Sixth Amendments are not enough to distinguish *Elstad* from the present case.

The right to counsel protects the fairness and the reliability of the trial. See *supra*, at 6-9. Admitting Fellers' second statement does not compromise either principle. While there can be concerns about the reliability of confessions, "*Miranda* serves to guard against 'the use of unreliable statements at trial' . . . ." *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993) (quoting *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966)). Although it is possible for a confession to comply with *Miranda* but still be compelled, that situation is "rare." See *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984). Voluntary, *Miranda*-compliant confessions such as Fellers' are not simply necessary evils, they are an "unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Since such confessions come from "the most knowledgeable and unimpeachable source about [the defendant's] past conduct" they can be more reliable than eyewitness testimony. See *Bruton* v. *United States*, 391 U. S. 123, 140 (1968) (White, J., dissenting). If anything, admitting Fellers' second confession made his conviction more reliable. Nor is there any unconstitutional unfairness in admitting Fellers' second incriminating statement. When the accused is informed of the right to counsel and makes an express, voluntary waiver of his rights, there is no need for the presence of counsel during the interrogation. See *Moran* v. *Burbine*, 475 U. S. 412, 426-427 (1986). Since the first incriminating statement did not taint the *Miranda* waiver, there is no unfairness in holding Fellers to his confession.

The defendant's efforts to justify applying the fruits doctrine are at best ineffectual. His claim that suppressing the second confession deters *Massiah* violations, see Brief for Petitioner 19, is readily refuted by *Elstad*, which severs any causal relationship between an illegal but voluntary confession and a subsequent valid confession. Fellers also claims that

applying the fruits doctrine here serves the fair trial interests of the Sixth Amendment.

> "Defendants are entitled to the assistance of counsel at critical pretrial confrontations with the government because of the trial effects of such encounters—namely, that the 'results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality" ' *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984) (quoting [*United States* v. *Wade*, 388 U. S. 218, 224 (1967)])." *Ibid.*

In context, this quote from *Gouveia* limits what is considered "critical":

> "Although we have extended an accused's right to counsel to certain 'critical' pretrial proceedings, *United States* v. *Wade*, 388 U. S. 218 (1967), we have done so recognizing that at those proceedings, 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,' *United States* v. *Ash*, [413 U. S. 300, 310 (1973)], in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' *United States* v. *Wade*, *supra*, at 224." *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984).

Judged by this standard, questioning by the police is no more "critical" after indictment than it was before. The police are no more expert, and the procedure is no more complex. Fellers second, *Miranda*-compliant, confession is not the type of confrontation that calls into question the fairness or the reliability of the trial. Suppressing the statement would keep a highly credible admission of guilt from the trier of fact while adding nothing to the reliability or fairness of his trial. *Massiah* has already overextended the Sixth Amendment. There is no need to extend it even one more inch.

IV. *Massiah* should be limited to its facts.

Massiah v. *United States*, 377 U. S. 201 (1964) is a decision that warrants ample criticism. It takes the Sixth Amendment right to counsel to its very edge and beyond. See Part I, *supra*. This decision denies society its compelling interest in securing and admitting voluntary admissions of guilt. *Massiah* also creates perverse incentives in our criminal justice system. Decisions to initiate proceedings will not be based upon the strength of the case and the suspect's danger to society, but will also be influenced by the need to further investigate the suspect. See Part I-A, *supra*.

This Court once turned down an opportunity to reexamine *Massiah*. See *United States* v. *Henry*, 447 U. S. 264, 269, n. 6 (1980). *Amicus* suggests that *Henry*'s summary dismissal of the invitation should not foreclose this Court from reexamining *Massiah* in this case. *Massiah* should be limited.

Recent decisions of this Court demonstrate that *stare decisis* is far from an impenetrable barrier to reconsidering precedents. In *Ring* v. *Arizona*, 536 U. S. 584, 589 (2002), this Court partially overruled *Walton* v. *Arizona*, 497 U. S. 639 (1990) in spite of the fact that several state governments relied on *Walton* when constructing their capital punishment procedures. *Lawrence* v. *Texas*, 539 U. S. __, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003) demonstrates that the level of public interest in a case will not prevent its reconsideration. See *id.*, at 525, 123 S. Ct., at 2484 (overruling *Bowers* v. *Hardwick*, 478 U. S. 186 (1986)). Since *Massiah* is a case establishing extra procedural protections for criminal defendants, the reliability interest in *Massiah* is low, making *stare decisis* particularly weak. See, *e.g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991).

Massiah is poorly reasoned, inconsistent with Sixth Amendment principles, and contrary to this Court's precedents. It burdens society by suppressing highly reliable, relevant evidence. See Part I, *supra*. What little legitimate protection

it gives to the accused is largely redundant since *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Since a *Miranda* waiver also waives *Massiah* rights, *Massiah* is unnecessary in virtually any direct confrontation between the accused and the police.

Massiah's only real utility to the defendant is in those cases involving informants. Since this case does not involve police informants, it is unnecessary to decide whether the *Massiah* rule should still hold in these cases. The present case, however, is an appropriate vehicle for removing direct confrontations between the police and the suspects from *Massiah*'s grip.

Brewer v. *Williams*, 430 U. S. 387 (1977) is the only Supreme Court *Massiah* case involving a direct confrontation between the police and the accused. Even under *Brewer*'s unusual facts, a case with the same facts today would reach the same result without *Massiah*. There is a strong case that the Christian burial speech constituted a *Miranda* violation. While there was no express questioning of Williams, *Miranda* is not limited to express questioning. *Rhode Island* v. *Innis*, 446 U. S. 291, 298-299 (1980). Instead, the relevant issue under *Miranda* is whether the defendant was functionally questioned through words or deeds "that the police should know [are] reasonably likely to elicit an incriminating response from the suspect . . . ." *Id.*, at 301 (footnotes omitted). While the *Innis* Court took pains to distinguish *Brewer*, see *id.*, at 300, n. 4, the *Brewer* Court's characterization of Williams' treatment appears to satisfy that standard. "There can be no serious doubt, either, that [the detective] deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U. S., at 399. Since there was no effective waiver of his previously asserted right to counsel, see *id.*, at 405-406, Williams had a valid *Miranda* claim. Therefore, even if *Massiah* did not apply, the initial statements still would be suppressed under *Miranda*, but the derivative evidence from those statements would still be admitted under inevitable discovery. Even under *Brewer*'s extreme facts, *Miranda*

provides all the necessary protection, and *Massiah* is merely ornamental.

Limiting *Massiah* to its facts, prohibiting the government from using informants to deliberately elicit information from indicted defendants, would involve only a minor disruption of this Court's precedents. The result of the redundant *Brewer* case would not change. Since government informants do not have to give *Miranda* warnings when talking to a suspect, see *Illinois* v. *Perkins*, 496 U. S. 292, 299-300 (1990), *Massiah* itself would not be overruled.

Massiah's precedent now bears little worthwhile fruit. Since *Miranda*, it no longer adds to the fairness of the trial or its integrity in any meaningful way when police directly confront a suspect. In this case, it can only operate to provide the defendant with a windfall, *i.e.*, excluding a statement that would be admissible under the exceptions to *Miranda*.[4] *Elstad* merely because criminal proceedings had commenced. This distinction should not make a difference. *Massiah* should be pruned back.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

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Respectfully submitted,

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4. The *Miranda* exceptions survive *Dickerson* v. *United States*, 530 U. S. 428 (2000). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *United States* v. *Patane*, No. 02-1183, at 6-10.